

DEPARTMENT OF COMMERCE

COURT OF THE UNITED STATES

RECEIVED FEB. 1907

No. 555.

THE PRIMA COMPANY, PETITIONER.

THE PRIMA COMPANY, LTD. OWNER OF THE
PRIMA BRAND, AND HUGH HOGARTH &

THE PRIMA COMPANY, LTD. OWNER OF THE
PRIMA BRAND, AND HUGH HOGARTH &

(17,212)

(27,912)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 555.

THE TEXAS COMPANY, PETITIONER,

VS.

HOGARTH SHIPPING COMPANY, LTD., OWNER OF THE
STEAMSHIP BARON OGILVY, AND HUGH HOGARTH &

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT.

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THE NEW YORK PUBLIC LIBRARY

United States District Court

SOUTHERN DISTRICT OF NEW YORK.

THE TEXAS COMPANY,
Libelant,

against

HOGARTH SHIPPING CO., LTD.,
owner of the Steamship *Baron*
Ogilvy, and HUGH HOGARTH &
SONS,

Respondents.

Statement.

1915

Sept. 22—Libel filed.

1916

Jan. 13—Answer, with interrogatories, of Hogarth Shipping Company, Ltd., filed.

Jan. 17—Answer, with interrogatories, of Hugh Hogarth & Sons filed.

Jan. 29—Bond on attachment filed.

1919

Jan. 3—Cause tried before Hon. Charles M. Hough, J. J.

Counsel for the British Embassy in the United States permitted to intervene at the trial as *amici curiae* and file Suggestion and Certificate.

Interrogatories annexed to answer answered orally at the trial.

Feb. 4—Opinion dismissing libel filed.

Feb. 21—Final decree entered.

July 11—Notice of appeal (libelant's) filed.

July 11—Assignment of errors filed.

Libel.

*To the Honorable the Judges of the United States
District Court for the Southern District of New
York :*

The libel of the Texas Company, a corporation, against Hogarth Shipping Company, Ltd., a corporation, and Hugh Hogarth & Sons, a co-partnership, in a cause of contract civil and maritime, alleges as follows:

5 FIRST: At all times herein mentioned the libelant was and still is a corporation organized and existing under the laws of the State of Texas, and having its principal office at 17 Battery Place, Borough
6 of Manhattan, City of New York.

SECOND: On information and belief, at all said times the respondent Hogarth Shipping Company, Ltd., was and still is a corporation, organized and existing under the laws of the Kingdom of Great Britain and Ireland, having its principal office and place of business in said Kingdom and having no office or place of business in this District or in the United States, and at all said times the respondents Hugh Hogarth & Sons, were and still are co-partners, having their principal office and place of business at Glasgow, Scotland, and having no office or place of business in this District or in the United
6 States; and at all said times the respondents have been and still are the owners of the Steamships *Baron Ogilvy* and *Baron Cawdor*.

THIRD: On or about February 6, 1915, at New York, a certain charter party in writing was entered into between the libelant and the respondents whereby the respondents agreed, on certain terms and conditions, to charter to the libelant a steamship to be declared on or before March 15, 1915,

for a voyage from Port Arthur, Texas, to South African ports as therein specified, with a full cargo of refined petroleum in cases, to be furnished by the libelant, steamer to load between April 15th and May 15th, 1915; and the libelant agreed to pay for the carriage and delivery of said cargo the sum of 47c for each case delivered, if the vessel should discharge at one port only, and to pay certain additional freight in case of discharge at more than one port. The steamship *Baron Ogilvy* was, on or about March 11th, 1915, named by the respondents for the performance of the said charter party.

FOURTH: The respondents have nevertheless wholly failed and refused to send said steamship or any steamship to Port Arthur or to tender any steamship for the carriage of said cargo, and have, on the contrary, refused to do so, and have never carried nor offered to carry said cargo or any part thereof, but have repudiated their obligations under said charter party.

FIFTH: The libelant has duly performed all the conditions of said charter party on its part to be performed.

SIXTH: By reason of the premises the libelant was obliged to secure other tonnage to carry said cargo, which it did at the best rate obtainable, but was obliged to pay a much larger sum as freight for the carriage of said cargo than that fixed in the said charter party. By reason of the premises the libelant has sustained damage in the sum of approximately \$50,000, no part of which has been paid, although duly demanded.

SEVENTH: On information and belief, the respondents cannot be found within this District, but

they have within this District goods and chattels, to wit, the Steamship *Baron Caudor*, her engines, boilers, etc.

EIGHTH: All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

- WHEREFORE, the libelant prays that process in due form of law, according to the practice of this Honorable Court in causes of admiralty and maritime jurisdiction, may issue against the said respondents, Hogarth Shipping Company, Ltd., and
- 11 Hugh Hogarth & Sons, and that said respondents, and each of them, may be cited to appear and answer on oath the matters aforesaid; and that, if said respondents cannot be found, then their goods and chattels, to wit, the Steamship *Baron Caudor*, her engines, boilers, etc., be attached to answer the libelant's demand, and that the libelant have a decree for the amount of damages sustained by it as aforesaid, together with interest and costs, and such other and further relief as may be just.

HAIGHT, SANDFORD & SMITH,

Proctors for Libelant,

27 William Street,

New York City.

SOUTHERN DISTRICT OF NEW YORK, SS.:

W. A. THOMPSON, JR., being duly sworn, deposes and says:

I am Vice-President of the Texas Company, the libelant herein. I have read the foregoing libel and know the contents thereof, and the same is true of my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

The reason why this verification is not made by the libelant is that it is a corporation and incapable of making the same.

The sources of my information and the grounds of my belief as to the matters stated on information and belief are my possession of a copy of the charter party and my familiarity with the affairs of the libelant as its Vice-President, and also letters written to me by Messrs. J. H. Winchester & Company, who acted as agent for the respondent herein.

W. A. THOMPSON, JR.

Sworn to before me this

18th day of September, 1915.

GUY STEVENS,

Notary Public No. 3593,

(SEAL) New York Co.

Endorsed: Libel, Filed Sept. 22, 1915.

16 **Answer of Hogarth Shipping Company,
Ltd.**

To the Honorable Judges of the United States District Court for the Southern District of New York:

The separate answer of Hogarth Shipping Company, Ltd., a corporation, one of the respondents herein, to the libel of The Texas Company, in a cause of contract, civil and maritime, alleges, on information and belief, as follows:

17 **FIRST:** It denies that it has any knowledge or any information sufficient to form a belief as to the matters alleged in the first article of the libel.

SECOND: It admits the matters alleged with regard to it in the second article of the libel, and that at the times mentioned in the libel it was, and is now, the owner of the steamships *Baron Ogilvy* and *Baron Cawdor*.

It alleges that Hugh Hogarth & Sons are a co-partnership, which has its principal office at Glasgow, Scotland, has not any office in this District or in the United States, but it denies that said co-partnership was, or has been, the owner of the steamships *Baron Ogilvy* and *Baron Cawdor*.

18 **THIRD:** It admits that on or about the 6th day of February, 1915, at New York, a charter-party in writing was entered into between the libelant and the respondent, containing certain terms and conditions, and that the steamship *Baron Ogilvy* was, on or about March 11, 1915, named by the respondent under said charter-party, and accepted by the libelant, as the vessel by which said charter-party was to be performed. It denies that the terms and conditions of the charter-party are fully or correctly set forth in the third article of the libel, and,

for greater certainty, demands the production of the original charter-party on the trial hereof.

FOURTH: It admits that it has been prevented by the requisitioning of the steamship *Baron Ogilvy* by the Government of the Kingdom of Great Britain and Ireland, as hereinafter set forth, from placing the said steamship at the disposal of the libellant under the said charter-party, or carrying or offering to carry the cargo mentioned in the charter-party.

It denies the other matters alleged in the fourth article of the libel.

20

FIFTH: It denies that it has any knowledge or any information sufficient to form a belief as to the matters alleged in the fifth article of the libel.

SIXTH: It denies that it has any knowledge or any information sufficient to form a belief as to the matters alleged in the sixth article of the libel.

SEVENTH: It admits that at the time of the filing of the libel herein, it was not within this District, but it had within the District its steamship *Baron Cawdor*.

EIGHTH: It admits that the premises of the libel are within the jurisdiction of this Court, but it prays, for reasons hereinafter stated, that the Court refuse to take jurisdiction of the matter. It denies all the other matters alleged in the eighth article of the libel.

21

NINTH: Further answering, and as a further separate defence herein, and re-alleging the matters hereinabove set forth, as if they were herein again

22 *Answer of Hogarth Shipping Company, Ltd.*

fully pleaded, the respondent, Hogarth Shipping Company, Ltd., alleges that:

I. It is a corporation existing under the laws of the Kingdom of Great Britain and Ireland and a subject of said Kingdom, and that the steamship *Baron Ogilvy* is a British vessel sailing under the British flag and subject to the prerogatives of the British Crown and the orders and requirements of the British Government.

II. The charter-party referred to in the libel contains the following special clauses:

23

“Voyage Charter—Special Clause.

“It is a condition of this charter and the charterers undertake that:—

“(1) The ship shall be employed only in such trades and employments and shall carry only such goods, persons and things as are lawful for a British ship.

“(2) The ship shall not be used nor be documented in any such way nor shall she carry any such cargo or any cargo so documented as would expose her to seizure or condemnation by Great Britain or any of her Allies.

24

“(3) There shall not be any breach of any of the warranties which are now or may during the continuance of this charter be contained in the policies or contracts of insurance of the ship with the War Risks Insurance Association in which the ship is entered. The warranties now contained in such policies are as follows:

“(a) That the ship shall comply, so far as possible, with the orders of His Majesty’s

Government and the directions of the Committee as to routes, ports of call and stoppages.

“(b) That the ship shall not start on the voyages if ordered by His Majesty’s Government not to do so.

“(c) That the ship shall leave an enemy’s port within the days of grace allowed by the enemy and shall comply with the terms of any pass granted by the enemy.

“(d) That the ship shall not enter or leave, or attempt to enter or leave, any port which is known to be blockaded by the enemy.

26

“Upon breach of any of the conditions and undertakings mentioned in this clause, the owners shall have the right at any time to withdraw the ship from the service of the charterers, but notwithstanding such withdrawal the charterers shall in addition to any liability for damages, continue liable for the hire or freight hereby agreed to be paid.”

“All Bills of Lading given for cargo shipped under this charter party the charterers undertake and agree shall contain the following clause:

“‘The ship in addition to any liberties expressed or implied herein shall have the liberty to comply with any orders or directions as to departure, arrival, routes, ports of call, stoppages or otherwise howsoever given by His Majesty’s Government, or any Department thereof, or any person acting or purporting to act with the authority of His Majesty or of His Majesty’s Government or of any Department thereof, or by any committee or person

27

having under the terms of the War Risks Insurance on the ship the right to give such orders or directions, and nothing done or not done by reason of such orders or directions shall be deemed a deviation.'

"Should charterers fail to insert said clause Master shall have the right to refuse to sign such Bills of Lading."

29

III. On February 6, 1915, the date when the charter-party which is the subject matter of this suit was made, as the libellant then well knew, and at all the other times mentioned in the libel and in this answer, a state of war existed and has since continued and still exists between the Kingdom of Great Britain and Ireland and its Allies on the one side and the Empires of Germany and Austro-Hungary and their Allies on the other side.

30

IV. On April 10, 1915, whilst lying in the port of London, England, the steamship *Baron Ogilvy* was requisitioned by the Government of the Kingdom of Great Britain and Ireland for Government service, under and pursuant to the general prerogative of the British Crown and in pursuance of the Royal Proclamation dated August 4, 1914, a copy of which is hereto annexed, marked Schedule "A" and hereby made a part of this answer.

Pursuant to said requisition the steamship *Baron Ogilvy* was operated by and under the orders and directions of the British Government from April 10, 1915, the date of the requisition aforesaid, until after the filing of the libel herein.

The action of the British Government in requisitioning the steamer was the act of the respondent's sovereign, and the respondent and the steamship *Baron Ogilvy* were obliged to comply therewith, and to obey said requisition.

This action on the part of the British Government constituted a restraint of princes, rulers and people and a prohibition by the Government of the Kingdom of Great Britain and Ireland against the operation and proceeding of the vessel under the charter-party mentioned in the libel, and by reason of said action of the British Government the said charter-party became impossible of performance, both in law and in fact.

Notice of the fact that the steamship *Baron Ogilvy* had been requisitioned was given at once to The Texas Company through the respondent's representatives at New York.

32

By reason of the premises the respondent and the steamship *Baron Ogilvy*, on April 10, 1915, and at all times previously to the filing of the libel herein, were prevented from placing the steamship *Baron Ogilvy* at the disposal of the libelant under the said charter-party and were excused from further performance of the said charter-party.

Moreover, by the terms of the *Defence of the Realm Amendment Act Number 2 of 1915, passed March 16, 1915*, by the British Parliament, 5 Geo. V, Chap. 37, it is provided as follows:

"It is hereby declared that where the fulfilment by any person of any contract is interfered with by the necessity on the part of himself or any other person of complying with any requirement, regulation, or restriction of the Admiralty or the Army Council under the Defence of the Realm Consolidation Act, 1914, or this Act, or any regulations made hereunder that necessity is a good defence to any action or proceedings taken against that person in respect of the non-fulfilment of the Contract so far as it is due to that interference."

33

34 *Answer of Hogarth Shipping Company, Ltd.*

The fulfilment by the steamship *Baron Ogilvy* and her owner, the Hogarth Shipping Company, Ltd., of the charter-party above mentioned, has been interfered with and prevented by the necessity on the part of the said steamship and her owner of complying with the requirements, regulations and restrictions of the Government of the United Kingdom of Great Britain and Ireland.

V. The respondent and the steamship *Baron Ogilvy* have performed all the duties and obligations laid on them by the charter-party aforesaid.

35 VI. By reason of the premises, the respondent is not liable to the libelant for damages, or otherwise, herein.

36 TENTH: Further answering, and as a further and separate defence herein, and realleging the matters hereinabove set forth, as if they were herein again fully pleaded, the respondent prays that this Court refuse to take jurisdiction of this action on the ground that it involves the relationship between the owner of a British steamship and the British Government, and the determination by this Court of the effect of acts of the British Government occurring outside of the United States; and is in effect an attempt on the part of the libelant to hold the respondent liable for acts done by said Government. Therefore, the matter is not appropriately justiciable in this Court, and this Court should decline to take jurisdiction in the premises.

WHEREFORE, the respondent prays that the libel herein may be dismissed with costs to the respondent as against the libelant, and that the libelant

Answer of Hogarth Shipping Company, Ltd.

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will be required to answer in writing and under oath the interrogatories hereto annexed, and that the Court grant to the respondent such other or further relief as the justice of the cause may require.

KIRLIN, WOOLSEY & HICKOX,
Proctors for Repondent,
Hogarth Shipping Company, Ltd.,
Office and Post-Office Address:
27 William Street,
Borough of Manhattan,
New York, N. Y.

38

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

JOHN M. WOOLSEY, being duly sworn, says:

I am a member of the firm of Kirlin, Woolsey & Hickox, proctors for the respondent, Hogarth Shipping Company, Ltd., herein.

The foregoing answer is true of my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

The sources of my information and the reasons for my belief as to the matters not within my own knowledge are communications received from the respondent.

39

The reason this verification is not made by the respondent is that it is a foreign corporation and none of its officers is within the United States.

JOHN M. WOOLSEY.

Sworn to before me this

13th day of January, 1916.

CLETUS KEATING,

Notary Public.

(Seal) New York County.

SCHEDULE "A."

BY THE KING.

A PROCLAMATION

FOR AUTHORIZING THE LORDS COMMISSIONERS OF THE ADMIRALTY TO REQUISITION ANY BRITISH SHIP OR BRITISH VESSEL WITHIN THE BRITISH ISLES OR THE WATERS ADJACENT THERETO.

GEORGE, R. I.:

41 WHEREAS a national emergency exists rendering it necessary to take steps for preserving and defending national interests:

AND WHEREAS the measures approved to be taken require the immediate employment of a large number of vessels for use as Transports and as Auxiliaries for the convenience of the Fleet and for other similar services, but owing to the urgency of the need it is impossible to delay the employment of such vessels until the terms of engagement have been mutually agreed upon:

42 NOW, THEREFORE, We authorize and empower the Lords Commissioners of the Admiralty by Warrant under the hand of their Secretary or under the hand of any Flag Officer of Our Royal Navy holding any appointment under the Admiralty to requisition and take up for Our service any British ship or British vessel as defined in the Merchant Shipping Act, 1894, within the British Isles, or the waters adjacent thereto, for such period of time as may be necessary, on condition that the Owners of all ships and vessels so requisitioned shall receive payment for their use, and for services ren-

dered during their employment in the Government service, and compensation for loss or damage thereby occasioned, according to terms to be arranged as soon as possible after the said ship has been taken up, either by mutual agreement between the Lords Commissioners of the Admiralty and the Owners or failing such agreement by the award of a Board of Arbitration to be constituted and appointed by Us for this purpose.

Given at Our Court at Buckingham Palace this Third day of August, in the year of our Lord one thousand nine hundred and fourteen, and in the Fifth year of Our Reign.

God Save the King.

INTERROGATORIES ADDRESSED TO THE LIBELANT UNDER AND IN PURSUANCE OF THE RULES OF THE UNITED STATES SUPREME COURT AND OF THIS COURT TO BE ANSWERED BY THE LIBELANT OR ONE OF ITS OFFICERS IN WRITING AND UNDER OATH:

First Interrogatory: a. On what date and by whom were you first notified of the requisition by the British Government of the steamship *Baron Ogilvy*? b. Was the notification in writing? If so, please produce the notification and annex it to your answer to this interrogatory.

Second Interrogatory: a. Referring to Article 6 of the libel, did you secure any other tonnage to carry the cargo mentioned in the libel? b. If yea, please state on what date you contracted for such other tonnage, and if the contract or charter-party was in writing, please produce a certified

46 *Answer of Hogarth Shipping Company, Ltd.*

copy of it and annex it to your answer to this interrogatory.

Third Interrogatory: a. Is it not a fact that The Texas Company at all the times mentioned in the libel had, and since has had, an office and agent in London, England? b. Is it not a fact that this office of The Texas Company was in the Billiter Buildings, 22 Billiter Street, London, E. C., England? c. If it was not at the address given, where was it? d. Since what date has The Texas Company maintained its London office?

47 Fourth Interrogatory: Is it not a fact that on February 6, 1915, at the time when the charter-party was made, The Texas Company knew that a state of war existed between the Kingdom of Great Britain and Ireland and its Allies on the one side and the Empires of Germany and Austro-Hungary and their Allies on the other side?

KIRLIN, WOOLSEY & HICKOX,
Proctors for Respondent,
Hogarth Shipping Company, Ltd.,
Office and Post-Office Address:
27 William Street,
Borough of Manhattan,
New York, N. Y.

48 Endorsed: Answer and Interrogatories. Filed
Jan. 13, 1916.

Answer of Hugh Hogarth & Sons.

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To the Honorable Judges of the United States District Court for the Southern District of New York:

The separate answer of Hugh Hogarth & Sons, a co-partnership, one of the respondents herein, to the libel of The Texas Company, in a cause of contract, civil and maritime, against the Hogarth Shipping Company, Ltd., and Hugh Hogarth & Sons, alleges, on information and belief, as follows:

FIRST: They deny that they have any knowledge or any information sufficient to form a belief as to the matters alleged in the first article of the libel. 50

SECOND: They admit that Hugh Hogarth & Sons are a co-partnership with their principal office and place of business at Glasgow, Scotland, and without any place of business in this District or in the United States, but they deny that said co-partnership is now, or was at the times mentioned in the libel, or has been the owners of the steamships *Baron Ogilvy* and *Baron Cawdor*.

They admit that the Hogarth Shipping Company, Ltd., at the times mentioned in the libel was, and now is, the owner of the steamships *Baron Ogilvy* and *Baron Cawdor*.

THIRD: They admit that on or about the 6th day of February, 1915, at New York, a charter-party in writing, was entered into between the libelant and the respondent, Hogarth Shipping Company, Ltd., containing certain terms and conditions, and that the steamship *Baron Ogilvy* was, on or about March 11, 1915, named by the respondent, Hogarth Shipping Company, Ltd., under said charter-party, and accepted by the libelant, as the 51

vessel by which said charter-party was to be performed. They deny that the terms and conditions of the charter-party are fully or correctly set forth in the third article of the libel, and, for greater certainty, demand the production of the original charter-party on the trial hereof.

FOURTH: They admit that the Hogarth Shipping Company, Ltd., has been prevented by the requisitioning of the steamship *Baron Ogilvy* by the Government of the Kingdom of Great Britain and Ireland, as hereinafter set forth, from placing the said steamship at the disposal of the libellant under the said charter-party, or carrying or offering to carry the cargo mentioned in the charter-party.

They deny the other matters alleged in the fourth article of the libel.

FIFTH: They deny that they have any knowledge or any information sufficient to form a belief as to the matters alleged in the fifth article of the libel.

SIXTH: They deny that they have any knowledge or any information sufficient to form a belief as to the matters alleged in the sixth article of the libel.

SEVENTH: They allege that at the time of the filing of the libel herein, the respondents were not within this District and did not have any property within the District. The steamship *Baron Cawdor* then within the District was the property of the Hogarth Shipping Company, Ltd.

EIGHTH: They admit that the premises of the libel are within the jurisdiction of this Court, but

they pray, for reasons hereinafter stated, that the Court refuse to take jurisdiction of the matter. They deny all the other matters alleged in the eighth article of the libel.

NINTH: Further answering, and as a further and separate defence herein, and realleging the matters hereinabove set forth, as if they were herein again fully pleaded, the respondents, Hugh Hogarth & Sons, allege that:

I. They are a co-partnership, the members of which are all British subjects, with their principal office at Glasgow, Scotland, and that the steamship *Baron Ogilvy* is a British vessel sailing under the British flag and subject to the prerogatives of the British Crown and the orders and requirements of the British Government.

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II. The charter-party referred to in the libel contains the following special clauses:

“Voyage Charter—Special Clause.

“It is a condition of this charter and the charterers undertake that:

“(1) The ship shall be employed only in such trades and employments and shall carry only such goods, persons and things as are lawful for a British ship.

57

“(2) The ship shall not be used nor be documented in any such way nor shall she carry any such cargo or any cargo so documented as would expose her to seizure or condemnation by Great Britain or any of her Allies.

"(3) There shall not be any breach of any of the warranties which are now or may during the continuance of this charter be contained in the policies or contracts of insurance of the ship with the War Risks Insurance Association, in which the ship is entered. The warranties now contained in such policies are as follows:

"(a) That the ship shall comply, so far as possible, with the orders of His Majesty's Government and the directions of the Committee as to routes, ports of call and stoppages.

"(b) That the ship shall not start on the voyages if ordered by His Majesty's Government not to do so.

"(c) That the ship shall leave an enemy's port within the days of grace allowed by the enemy and shall comply with the terms of any pass granted by the enemy.

"(d) That the ship shall not enter or leave, or attempt to enter or leave, any port which is known to be blockaded by the enemy.

"Upon breach of any of the conditions and undertakings mentioned in this clause, the owners shall have the right at any time to withdraw the ship from the service of the charterers, but notwithstanding such withdrawal the charterers shall, in addition to any liability for damages, continue liable for the hire or freight hereby agreed to be paid.

"All Bills of Lading given for cargo shipped under this charter-party the charterers undertake and agree shall contain the following clause:

"The ship, in addition to any liberties expressed or implied herein, shall have the liberty to comply with any orders or directions as to departure, arrival, routes, ports of call, stoppages or otherwise howsoever given by His Majesty's Government, or any Department thereof, or any person acting or purporting to act with the authority of His Majesty or His Majesty's Government or of any Department thereof, or by any committee or person having under the terms of the War Risks Insurance on the ship the right to give such orders or directions, and nothing done or not done by reason of such orders or directions shall be deemed a deviation."

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"Should charterers fail to insert said clause Master shall have the right to refuse to sign such Bills of Lading."

III. On February 6, 1915, the date when the charter-party which is the subject matter of this suit was made, as the libellant then well knew, and at all the other times mentioned in the libel and in this answer, a state of war existed and has since continued and still exists between the Kingdom of Great Britain and Ireland and its Allies on the one side and the Empires of Germany and Austro-Hungary and their Allies on the other side.

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IV. On April 10, 1915, whilst lying in the port of London, England, the steamship *Baron Ogilvy* was requisitioned by the Government of the Kingdom of Great Britain and Ireland for Government service, under and pursuant to the general prerogative of the British Crown and in pursuance of the Royal Proclamation dated August 4, 1914, a copy of which is hereto annexed, marked Schedule "A," and hereby made a part of this answer.

Pursuant to said requisition the steamship *Baron Ogilvy* was operated by and under the orders and directions of the British Government from April 10, 1915, the date of the requisition aforesaid, until after the filing of the libel herein.

The action of the British Government in requisitioning the steamer was the act of the respondents' sovereign, and the respondents, Hogarth Shipping Co., Ltd., and Hugh Hogarth & Sons, and the steamship *Baron Ogilvy*, were obliged to comply therewith, and to obey said requisition.

This action on the part of the British Government constituted a restraint of princes, rulers and people and a prohibition by the Government of the Kingdom of Great Britain and Ireland against the operation and proceeding of the vessel under the charter-party mentioned in the libel, and by reason of said action of the British Government the said charter-party became impossible of performance, both in law and in fact.

Notice of the fact that the steamship *Baron Ogilvy* had been requisitioned was given at once to The Texas Company through the representatives of Hogarth Shipping Company, Ltd., at New York.

By reason of the premises the respondent, Hogarth Shipping Company, Ltd., and the steamship *Baron Ogilvy* on April 10, 1915, and at all the times previously to the filing of the libel herein were prevented from placing the steamship *Baron Ogilvy* at the disposal of the libelant under the said charter-party and were excused from further performance of the said charter-party.

Moreover, by the terms of the Defence of the Realm Amendment Act, Number 2, of 1915, passed March 16, 1915, by the British Parliament, 5 Geo. V, Chap. 37, it is provided as follows:

"It is hereby declared that where the fulfilment by any person of any contract is interfered with by the necessity on the part of himself or any other person of complying with any requirement, regulation or restriction of the Admiralty or the Army Council under the Defence of the Realm Consolidation Act, 1914, of this Act, or any regulations made hereunder, that necessity is a good defence to any action or proceedings taken against that person in respect of the non-fulfilment of the Contract so far as it is due to that interference."

The fulfilment by the steamship *Baron Ogilvy*, and her owner, the Hogarth Shipping Company, Ltd., and by Hugh Hogarth & Sons of the charter-party above mentioned, has been interfered with and prevented by the necessity on the part of the said steamship and her owner of complying with the requirements, regulations and restriction of the Government of the United Kingdom of Great Britain and Ireland.

V. The respondents, Hogarth Shipping Company, Ltd., and Hugh Hogarth & Sons, and the steamship *Baron Ogilvy* have performed all the duties and obligations laid on them by the charter-party aforesaid.

VI. By reason of the premises, the respondents, Hugh Hogarth & Sons, are not liable to the libellant for damages, or otherwise, herein.

TENTH: Further answering, and as a further and separate defence herein, and realleging the matters hereinabove set forth, as if they were herein again fully pleaded, the respondents pray

that this Court refuse to take jurisdiction of this action on the ground that it involves the relationship between the owner of a British steamship and the British Government, and the determination by this Court of the effect of acts of the British Government occurring outside of the United States; and is in effect an attempt on the part of the libelant to hold the respondents liable for acts done by said Government. Therefore, the matter is not appropriately justiciable in this Court, and this Court should decline to take jurisdiction in the premises.

WHEREFORE, the respondents pray that the libel herein may be dismissed with costs to the respondents as against the libelant, and that the libelant will be required to answer in writing and under oath the interrogatories hereto annexed, and that the Court grant to the respondents such other or further relief as the justice of the cause may require.

KIRLIN, WOOLSEY & HICKOX,

Proctors for Respondents,

Hugh Hogarth & Sons,

Office and Post-Office Address:

27 William Street;

Borough of Manhattan,

New York, N. Y.

STATE OF NEW YORK, }
 COUNTY OF NEW YORK, } ss.:

JOHN M. WOOLSEY, being duly sworn, says:

I am a member of the firm of Kirlin, Woolsey & Hickox, proctors for the respondents, Hugh Hegarth & Sons, herein.

The foregoing answer is true of my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

The sources of my information and the reasons for my belief as to the matters not within my own knowledge are communications received from the respondents. 74

The reason this verification is not made by the respondents is that they are a foreign co-partnership and none of their members is within the United States.

JOHN M. WOOLSEY.

Sworn to before me this
 day of January, 1916.

SCHEDULE "A."

BY THE KING.

A PROCLAMATION

FOR AUTHORIZING THE LORDS COMMISSIONERS OF THE ADMIRALTY TO REQUISITION ANY BRITISH SHIP OR BRITISH VESSEL WITHIN THE BRITISH ISLES OR THE WATERS ADJACENT THERETO.

GEORGE R. I.:

77 WHEREAS a national emergency exists rendering it necessary to take steps for preserving and defending national interests:

AND WHEREAS the measures approved to be taken require the immediate employment of a large number of vessels for use as Transports and as Auxiliaries for the convenience of the Fleet and for other similar services, but owing to the urgency of the need it is impossible to delay the employment of such vessels until the terms of engagement have been mutually agreed upon:

78 NOW, THEREFORE, We authorize and empower the Lords Commissioners of the Admiralty by Warrant under the hand of their Secretary or under the hand of any Flag Officer of Our Royal Navy holding any appointment under the Admiralty to requisition and take up for Our service any British ship or British vessel as defined in the Merchant Shipping Act, 1894, within the British Isles, or the waters adjacent thereto, for such period of time as may be necessary on condition that the Owners of all ships and vessels so requisitioned shall receive payment for their use, and for services rendered during their employment in the Government

service, and compensation for loss or damage thereby occasioned, according to terms to be arranged as soon as possible after the said ship has been taken up, either by mutual agreement between the Lords Commissioners of the Admiralty and the Owners or, failing such agreement, by the award of a Board of Arbitration to be constituted and appointed by Us for this purpose.

Given at our Court at Buckingham Palace this Third day of August, in the year of our Lord one thousand nine hundred and fourteen, and in the Fifth year of Our Reign.

God Save the King.

INTERROGATORIES ADDRESSED TO THE LIBELANT UNDER AND IN PURSUANCE OF THE RULES OF THE UNITED STATES SUPREME COURT AND OF THIS COURT TO BE ANSWERED BY THE LIBELANT OR ONE OF ITS OFFICERS IN WRITING AND UNDER OATH:

First Interrogatory: a. On what date and by whom were you first notified of the requisition by the British Government of the steamship *Baron Ogilvy*? b. Was the notification in writing? If so, please produce the notification and annex it to your answer to this interrogatory.

Second Interrogatory: a. Referring to Article 6 of the libel, did you secure any other tonnage to carry the cargo mentioned in the libel? b. If yea, please state on what date you contracted for such other tonnage, and if the contract or charter-party was in writing, please produce a certified copy of it and annex it to your answer to this interrogatory.

Third Interrogatory: a. Is it not a fact that The Texas Company at all the times mentioned

in the libel had, and since has had, an office and agent in London, England? b. Is it not a fact that this office of The Texas Company was in the Billiter Buildings, 22 Billiter Street, London, E. C., England? c. If it was not at the address given, where was it? d. Since what date has The Texas Company maintained its London office?

Fourth Interrogatory: Is it not a fact that on February 6, 1915, at the time when the charter-party was made, The Texas Company knew that a state of war existed between the Kingdom of Great Britain and Ireland and its Allies on the one side and the Empires of Germany and Austro-Hungary and their Allies on the other side?

KIRLIN, WOOLSEY & HICKOX,
Proctors for Respondents,
Hugh Hogarth & Sons,
Office & Post-Office Address,
27 William Street,
Borough of Manhattan,
New York, N. Y.

Endorsed: Answer and Interrogatories. Filed
Jan. 17, 1916.

Minutes of Trial.

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DISTRICT COURT OF THE UNITED STATES.**SOUTHERN DISTRICT OF NEW YORK.**

THE TEXAS COMPANY, Libellant,	Before: HOUGH, J.
against	
HOGARTH SHIPPING COMPANY, LTD., and HUGH HOGARTH & SONS, Respondents.	86

New York, January 3rd, 1919,
10.30 A. M.

APPEARANCES:

MESSRS. HAIGHT, SANDFORD & SMITH, by Mr. Deming and Mr. Poor, for the libellant.

MESSRS. KIRLIN, WOOLSEY & HICKOX, by Mr. Woolsey, for the respondents.

FREDERICK R. COUDERT, Esq., and HOWARD KINGSBURY, Esq., for the British Embassy.

Mr. Kingsbury: Mr. Coudert and I appear this morning, and on behalf of the British Embassy ask leave to intervene as *amici curiae* for the British Government, and avow this requisition as a governmental action. It is the same procedure that was followed in the Claveresk case.

Mr. Deming: I would like to open the case first and then ask Mr. Kingsbury to make his motion.

The Court: I will hear the whole case.

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Mr. Deming: Well, I may have an exception at this time?

The Court: Oh, yes.

Mr. Deming: Before stating the case, I would like to call attention to the fact that the libel reads against the Hogarth Shipping Company, Ltd., and also against Hugh Hogarth & Sons, a partnership. The answers indicate and the evidence substantiates the contention that the charter-party was actually between The Texas Company and the Hogarth Shipping Company, Ltd.; and that no action will probably lie against the partnership. The reading of the charter-party was such that at the time of the filing of the libel we could not tell.

(Opening statement by Mr. Deming.)

(Opening statement by Mr. Woolsey.)

The Court: Now, you have raised the defense of a governmental act, in its broadest way, and since that defense is put forward by the respondent, Mr. Kingsbury, why do you intervene?

Mr. Kingsbury: Because we are instructed on behalf of the British Embassy to represent to the Court that the Court should decline to take jurisdiction of a controversy which involves either the validity or effect of a strictly governmental act of the Government of Great Britain upon British subjects. The government which requisitioned the vessel comes forward to avow that as a purely governmental act, and represents to this Court that a foreign Court should not interfere to determine the legal force of that requisition, that that is a question for the British Courts and not for the American Courts. If there is any claim by the libellant against the respondent, which does not involve directly the validity or effect of the requisition, of course as to that we are not concerned; but so far as it arises purely out of the requisition-

tion, the position of the British Government is that it wishes to stand behind to that extent the parties whose property it took under governmental processes, and to suggest to this Court that if any claim arises out of that act, it should be remitted to the British Courts, and not determined by the Courts of the United States.

The Court: My very prompt reaction to that suggestion is to inquire whether The Texas Company is not an American person.

Mr. Deming: It is.

The Court: I don't see any reason why this Court or any Court sitting in the United States should abdicate or decline, or would have any right to abdicate or decline jurisdiction, properly involved *in personam*, when it is called upon to adjudicate the rights of an American person or citizen against a British person or citizen, whose person or property is found within its jurisdiction, unless the exercise of that jurisdiction interferes with the actual execution of governmental functions by the Crown, which this don't at all.

Mr. Kingsbury: One more word, a further suggestion, is that they avow the requisition so as to put the fact and the validity of it as a governmental act beyond further inquiry in this court; in several of these cases so much has been said in the course of the trials upon the validity of the requisition; and this is really the primary purpose of the suggestion, that the Court should not go behind the fact of the requisition and undertake to inquire into its validity under the law of England. There was in the Claveresk case an indication of an attack upon the validity of the requisition, and when the government that makes the requisition comes into court and avows it and stands behind it as an act of the government—that was

one of the principal questions involved in the Claveresk case heard a short time ago, before Judge Hand.

Mr. Woolsey: I have just sent for the opinion in that case.

95 The Court: Well, my inclination, in my mind, would be to say to that that I am not at all concerned with the method of exercising an undoubted governmental power. *Non constat*, but that that power may have been exercised by an executive in defiance of the municipal law of the country to which the executive belongs; but the effect upon the ability to perform of, in this instance, the Hogarth Shipping Company would be absolutely the same. It would not make any difference. It may have been a duly authorized performance by that municipality. That is for the Courts of England. But if it was a governmental act, I should suppose it was to be treated as such, although it might be subject to attack at home. I don't see how it can be attacked indirectly in a foreign jurisdiction. What have you to say to that, Mr. Poor?

96 Mr. Poor: I would simply like to suggest that, of course, if your Honor is right as regards that fact, that the British Ambassador cannot extop the Court from jurisdiction, because this is an American contract, made in the United States with an American corporation. Now, my objection really goes further than anything said so far. We object to the British Ambassador intervening in this case at all.

The Court: Well, I think that is my business, and not yours. If I, or the Court, chooses to listen to the first man that comes in off the street, what right have you to object?

Mr. Poor: Well, it seems to us that it seriously—

The Court: Litigants do not own the Court. The Court is here for the purpose of listening to anybody and everybody, that it may contribute to the proper administration of what we are pleased to call justice.

Mr. Poor: Well, it is perfectly well established in diplomatic practice that if the Ambassador wishes to deal with any governmental power or official he has to make his suggestion through the State Department, and if the Ambassador wishes to take up any question with any government official it is the correct thing for him to submit what he wishes to say to the State Department, and have the State Department, if it considers it proper, then to carry it on to the party whom the Ambassador wishes to reach. It seems to me that it is just as improper for a foreign Ambassador to directly attempt to intervene in a case before a Court, without the sanction of the Secretary of State, as it is to deal with any other department of the government, whether that department is—

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The Court: I greatly resent that. I do not agree with you at all on that suggestion. It may be that the British Ambassador, if he chooses to come into a court of the United States, or any other sovereignty, and make representations, may be violating diplomatic custom; but that this Court in any way, shape or manner depends upon any branch of the executive department of the Government of the United States, and more especially the Secretary of State, for aid, guidance, direction or order as to who it shall hear, or when, or how, I do not tolerate that suggestion at all. I am sitting here as a representative of an independent and equally historical branch of the Government of the United States, and I take no orders from the Secretary of State and no directions from him.

99

Mr. Poor: There were some other points I wanted to cover. It has been suggested, by the way, that there was merely an irregularity in the requisition. Our contention is that there was never any requisition at all; that what was done was simply the notification to this man that the government wanted his boat, and that there was a perfectly voluntary charter, perhaps, entered into. I don't know whether you would care to have me go into the facts of that now.

The Court: I think the facts will develop in the course of the argument. You may make your case, Mr. Deming.

101

Mr. Deming: If your Honor please, due to the fact that Mr. Griffin went into the government service, we evidently neglected to file answers to the interrogatories annexed to the answers. I arranged with Mr. Woolsey that with your Honor's permission I would give oral answers to them at the opening of the trial.

Mr. Woolsey: That is agreeable to me.

The Court: All right.

Mr. Deming: The answer to the first interrogatory is "April 12, 1915; by letter from J. H. Winchester & Company, as follows," and I produce a copy of that letter to be considered as annexed to the answer.

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The Court: Let it be spread on the minutes.

"New York, April 12, 1915.

The Texas Company,

c/o Messrs. D. B. Dearborn & Co.,

8/10 Bridge Street, New York.

Gentlemen:

Baron Ogilvy.

Referring to this steamer's charter-party, dated at New York, February 6th, 1915, kindly

be advised that we are this morning in receipt of the following cable from Glasgow:

'Baron Ogilvy requisitioned.'

This means that the steamer has been commandeered by the British Admiralty and will, therefore, not be able to carry out charter-party with you.

Yours very truly,

(Sgd.) A. J. MOURIS,
Secretary."

Mr. Deming: The answer to the second interrogatory, A, is "Yes." The answer to B is "April 14, 1915," and I produce a copy of the charter-party called for, annexed to the answer. 104

The Court: Which is introduced in evidence and marked Libellant's Exhibit 1 of this date.

(Same so marked.)

Mr. Deming: The answer to the third interrogatory is "That The Texas Company has maintained an office in London since some time in October, 1911, and that under date of October 30, 1911, the representatives of The Texas Company in New York sent to London the necessary papers to qualify The Texas Company as a foreign corporation under the company's acts, but that the permanent agent at the London office has always had very limited powers so far as the transaction of business is concerned." The answer to the fourth interrogatory— 105

The Court: How about the rest of the third, Subdivision B and Subdivision C?

Mr. Deming: I regret to say that I have not that address.

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Minutes of Trial.
A. J. Mouris—For Libellant—Direct.

Mr. Woolsey: It is in London.

The Court: Then put it down in the record as to Interrogatory 3, Subdivision C, that counsel is not informed as to the exact address, that it is in London, England; and entry is made that the address suggested in the interrogatory is wrong.

Mr. Deming: The answer to the fourth interrogatory is "Yes." Mr. Woolsey admits the allegation of Article I of the libel, that The Texas Company is a corporation of the State of Texas, with its principal office and place of business in New York City. I offer in evidence certified copy of the charter-party of the *Ogilvy*.

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Mr. Woolsey: That is satisfactory to me.

(The same was marked Libellant's Exhibit No. 2 of this date.)

Mr. Woolsey: Mr. Deming wishes to have it called to the Court's attention on the record that these certificates that are annexed, the war clause certificates, are not part of The Texas Company form, and I am willing to admit that fact, and state that it is my belief that in the case of all British vessels that the clauses which are annexed with pasters to this charter-party are required to be annexed owing to war risk insurance and the governmental rules.

108

ANTHONY J. MOURIS, called as a witness by the libellant, was first duly sworn and testified as follows:

Direct examination by Mr. Deming.

Q. You are an officer of J. H. Winchester & Company? A. I am.

Q. Who acted as agents for the owners of the Hogarth steamers? A. Yes, sir.

Q. You acted in connection with the charter of the *Ogilvy*, the Hogarth steamer? A. Yes, sir.

Q. I call your attention to the special clauses pasted to this charter and ask you at whose instance those clauses were incorporated into the charter?

Mr. Woolsey: Objected to as irrelevant and immaterial.

The Court: Overruled.

A. They were put there at the request of the owners. 110

Mr. Deming: That is all.

The Court: Were they annexed or affixed to the paper called the charter-party at the time it was signed?

The Witness: Yes, sir; they were.

The Court: Then it may be noted on the record that the fact that they were put there by or at the instance of the owners seems to me wholly immaterial.

Mr. Deming: The sole purpose is to make use of the argument that the clauses incorporated in the contract at the instance of one party are to be construed strictly against the party so incorporating them. 111

Cross-examination by Mr. Woolsey.

Q. Isn't it a fact that it was required of all British steamers that those clauses should be annexed to the charter-parties of those steamers? A. Quite true of all British steamers which were chartered after the war broke out; so these clauses were put

on even though the owners did not state that at the time of the negotiations or not; but some owners would also always stipulate that the clauses were to go on, and others would not.

Q. But in any event they had to go on? A. It was a *sine qua non* condition, and acquiesced in at that time, that this clause would go on all British ships that were chartered.

Q. So that you would have put it in even though you had not heard from the owners mentioning those clauses? A. Probably would, yes, sir.

Mr. Deming: The answer admits the ship was never tendered under the charter-party, and the libellant rests.

The Court: Now, it may be entered upon the record that by permission of the Court Messrs. Frederick R. Coudert and Howard Kingsbury are admitted as *amici curiae* to the trial, and that these papers they present are to be marked by whatever exhibit number they should have, as filed.

(Same marked Exhibit No. 1.)

Mr. Woolsey: May I proceed?

The Court: You may.

Mr. Woolsey: I offer in evidence the testimony taken in England on open commission of the following witnesses: Samuel G. Hogarth, one of the officers of the owners; Ernest Julian Foley, of the offices of Director of Transports Division of the Admiralty—I don't remember his title exactly (examining papers)—Assistant Director to His Majesty's Director of Transports; and Charles Robertson Dunlop, a British barrister, who was examined on the British law

with regard to a charter-party under circumstances such as these; in that evidence which is enclosed in this envelope (indicating) are a series of legal opinions which Mr. Dunlop referred to; also the letters and correspondence which passed between the parties, and also the object of the charter-party, and the English Defense of the Realm Act, which is pleaded in our answer as a defence.

There is evidence also on behalf of the respondent which is in that same binder, but which we do not offer, because we do not regard it as relevant in view of the act of the British Government in making this requisition.

116

For the convenience of the Court I have summarized the dates, and if the Court has no objection, I will just mention them:

The charter-party was made February 6, 1915. I think this date is admitted.

The *Baron Ogilvy*, the vessel which was called to perform this charter, was furnished on March 11, 1915. This is alleged in the libel and admitted in the answer.

The requisition was made on April 10, 1915, whilst the vessel was in London. This is shown by Mr. Hogarth's evidence and the evidence of the witness Foley, and by the certificate of the Embassy; and the requisition continued until October 20, 1915, as shown by the Embassy's certificate and by Hogarth's evidence; and she was engaged in carrying mules for the British Government during all that period.

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Mr. Deming: May I object to the introduction of the certificate of the Embassy as evidence in this summary? Otherwise we have

no objection to it; and I take an exception to its receipt in evidence.

The Court: Very well.

Mr. Deming: In the copy of the testimony and correspondence which came to us there was no copy of the telegram referred to in the other telegrams as of April 9th, from Hogarth to Harley. I would like to inquire whether it appears in the original or not.

Mr. Woolsey: There is the original. I don't know, really.

(Papers examined by counsel.)

By consent of counsel the telegram of April 9, 1915, from Hogarth to Harley is considered as included in the correspondence taken by the commission, and is as follows:

"Ogilvy. Your wires received. We have received no intimation from admiralty. Have had some letters regarding this vessel from Hogg and Robinson, and we protested against further interference of freight and notified them steamer chartered. However, if requisition on steamer is absolute we would prefer vessel being put on mutual trade basis to the States rather than 11 shillings charter. Please endeavor renew similar all conditions similar recent conditions of other mutual ships always distinct understanding admiralty accept all responsibility steamers charter commitments."

The Court: Is that your case, Mr. Woolsey?

Mr. Woolsey: Yes, sir; that is our case. We have a deposition which seems to be on

your desk of which we have no copies. May I look at it a moment?

The Court: Yes.

Mr. Woolsey: (Examining same). I will offer that in evidence, too. It is the deposition of John Thompson, Master of the steamship *Ogilvy*, taken before D. S. Phlegar, Notary Public, and dated December 9, 1916, and consisting of twenty-one pages.

The Court: Is the case closed?

Mr. Deming: In reply the libellant offers in evidence the testimony of Sir Henry Erle Richards, contained in the depositions returned from England, and any exhibits referred to in his testimony, if there be any introduced in connection with his testimony.

122

Mr. Woolsey: I take objection to the introduction of this evidence of Sir Henry Erle Richards on the ground that inasmuch as the governmental act has been substantiated and avowed by the government, that evidence intended to be introduced in an attempt to prove the act was not a valid act, is irrelevant in a foreign court.

The Court: That is overruled; and an exception granted.

Is that all the case now?

Mr. Deming: Yes, sir.

123

Mr. Woolsey: Yes, sir.

The Court: You may proceed with the argument. I have the facts pretty clearly in my mind, I think.

(Closing arguments by counsel.)

124 **Suggestion and Certificate of the British Embassy—*Amici Curiae* Exhibit No. 1.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE TEXAS COMPANY,
Libellant,

against

HOGARTH SHIPPING COMPANY,
LTD., as owner of the Steam-
ship *Baron Ogilvy*, and HUGH
HOGARTH & SONS,
Respondents.

In Admiralty.

125

SUGGESTION SUBMITTED ON BEHALF OF THE BRITISH
EMBASSY.

Now come Frederic R. Coudert and Howard Thayer Kingsbury, counsel for the British Embassy in the United States of America, and pray leave of the Court to intervene in the above entitled cause as *amici curiae*, and as such *amici curiae* to present to the Court the annexed Certificate of the British Embassy and thereupon to represent to the Court on behalf of the British Em-
126 bassy as follows:

1. That the steamship *Baron Ogilvy*, on April 10th, 1915, while lying in the port of London, England, was requisitioned by the Government of the United Kingdom of Great Britain and Ireland for Government service by virtue of the prerogative of the British Crown; that the period of the said requisition was indefinite; and that from and after the date of requisition the Steamship *Baron Ogilvy*

was continuously in the service of the British Government and was operated solely under the orders and direction of the British Admiralty until October 20th, 1915.

2. That the Steamship *Baron Ogilvy* was of British registry and belonged to a corporation created and existing under British law; that the requisition of the said Steamship was a governmental action by the Government of the United Kingdom of Great Britain and Ireland; and that neither the fact of said requisition, nor its effects, should be enquired into by this Court.

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3. That this Court should decline to adjudicate this cause upon the ground that it involves the relations between the British Government and the owners of a British Steamship and calls for a determination by this Court of the effect of governmental acts of the British Government and constitutes an attempt on the part of the Libellant to hold the respondents liable for such acts.

4. That this Court should decline to adjudicate upon any rights or claims of the Libellants as charterers of a British Steamship against the said Steamship, or the owners thereof, in so far as such rights or claims arise out of the requisition of said Steamship by the British Government.

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Dated, January 3d, 1919.

FRERERIC R. COUDERT,
HOWARD THAYER KINGSBURY,
Counsel for the British Embassy,
Amici Curiae,
No. 2 Rector Street,
New York City, N. Y.

IT IS HEREBY CERTIFIED that the British steamship *Baron Ogilvy* on April 10th, 1915, while lying in the port of London, England, was requisitioned by the Government of the Kingdom of Great Britain and Ireland for Government service under the prerogative of the British Crown; that the period of said requisition was indefinite and that after it became operative as aforesaid, the steamship *Baron Ogilvy* was continuously in the service of the British Government and was operated solely under the orders and direction of the British Admiralty until October 20th, 1915; that said steamship was of British registry and belonged to a corporation created and existing under the laws of Great Britain and Ireland, and that the requisition of said steamship was a Governmental act by the Government of Great Britain and Ireland.

IN WITNESS WHEREOF this certificate has been issued by the British Embassy in the United States of America this fourth day of October, nineteen hundred and eighteen.

(Seal) COLVILLE BARCLAY,
H. M. Charge d'Affaires.

Depositions.

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IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE TEXAS COMPANY,
Libelant,

against

HOGARTH SHIPPING COMPANY,
LTD., owner of the Steamship
Baron Ogilvy, and HUGH HO-
GARTH & SONS,
Respondents.

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Depositions of witnesses taken at London, Eng-
land, by Commission.

WILLIAM A. CRUMP & SON of London, Eng. (Mr.
LE QUESNE), for the libelant.

THOMAS COOPER & Co. of London, Eng. (Mr. RAE-
BURN), for the respondents.

SAMUEL CRAWFORD HOGARTH, sworn as a witness 135
on behalf of the respondents, testified as follows:

Examined by Mr. Raeburn.

Q. You are the senior member of the firm of H.
Hogarth & Sons, shipowners, carrying on business
in Glasgow, Scotland? A. Yes.

Q. Is your firm the managers of the Hogarth
Shipping Company, Limited? A. Yes.

Q. That is a limited company with its registered office where? A. 24 St. Enoch Square, Glasgow.

Q. Is that company the owner of the steamship the *Baron Ogilvy*? A. Yes.

Q. I think the company also own a considerable number of other steamers? A. Yes.

Q. Is it a large fleet? A. The company owns about twelve other steamers.

Q. Now, there is no dispute that on the 8th February, 1915, that your firm of H. Hogarth & Sons, who were agents for the Hogarth Steamship Company, Limited, the owners of the *Baron Ogilvy*, made this contract with the Texas Company? A. Yes.

Q. Will you identify a copy of this charter-party as a matter of formality?

Mr. Le Quesne. That is objected to, as it is only a copy and not the original.

By Mr. Raeburn.

Q. The original is in New York? A. The original is in New York. The business was conducted by cable. That is as far as I can recollect a true copy.

(It was put in and marked S. C. H. 1.)

Q. Under that charter-party you had to declare a steamer on or before the 15th of March, 1915, to carry a cargo of oil from Port Arthur, Texas, to a port between Cape Town and Delagoa Bay, both inclusive? A. Yes, that is right.

Q. And did you on or about the 11th March, 1915, declare the *Baron Ogilvy* to fulfil this charter-party? A. I cannot recollect the date, but we declared the *Baron Ogilvy* in due time.

Q. And at the end of March, 1915, was the *Baron Ogilvy* due to arrive in London from Baltimore

with a cargo of oats? A. At the end of March she was, yes.

Q. At that time, at the end of March, had you a number of your fleet in requisition to the Admiralty? A. I think we had eight.

Q. Out of the twelve? A. No, out of about the twenty. We own two companies. The Hogarth Steamship Company owns the bigger steamers and the Kelvin Company owns the smaller ones.

Q. You state that the Kelvin Company own the smaller steamers? A. Yes.

Q. And the Hogarth Company the large ones? A. Yes.

Q. Of which the *Baron Ogilvy* was one? A. Yes.

Q. How many of the Hogarth Steamship Company's steamers were on requisition in March, 1915? A. Six.

Q. Half the fleet? A. Practically half the fleet.

Q. And of the number owned by the Kelvin Steamship Company? A. Two, I think.

Q. When the *Baron Ogilvy* arrived in London did you send the Captain a copy of the Texas Company's charter? A. I think it was rather before he arrived. I think the letter was waiting. At all events it was on or about his arrival.

Q. Was that letter of the 25th of March, 1915? A. Yes. We wrote the Captain of the steamer on that date.

Q. Now, so far as these are copies of your letters, are they correct copies? A. Yes; made from the press copy letter book.

Q. The first is the 25th of March, 1915, addressed to Captain Thompson of the steamship *Baron Ogilvy*. You informed the Captain that his ship was declared under open charter from Port Arthur, Texas, to the Cape ports, and say that a copy of

the charter is enclosed? A. Yes, that is quite correct.

Q. Then, in that same letter you go on to say: "If you are visited by any government officials you can inform them that the vessel is chartered from the States to the Cape and if necessary exhibit the charter-party." What is that in reference to?

A. We understood at that time the government were going to requisition further boats, and we thought that if the Captain could produce the charter-party and say his vessel was arranged for otherwise the government would leave his ship alone.

143 Q. The rest of the letter speaks for itself. On the 30th March did you again write to the Captain? A. We did, yes.

Q. I think you gave him certain instructions as to his movements and so on? A. We discussed how he was to bunker and dry dock.

Q. And something as to future movements of the vessel? A. Yes.

Q. On the 31st March, did you receive a telegram signed Evenhanded? A. Yes, that is Harley & Company.

Q. Who are Messrs. Harley & Company? A. Ship brokers, in London.

144 Q. Admiralty Note "*Baron Ogilvy* in London may require requisition her please post plan say when expect discharged"? A. Yes. The original is here.

Q. Have you had dealings with Harley & Company before? A. Frequently.

Q. On whose behalf were they acting? A. Generally on behalf of the Admiralty. At that time they were doing a very large portion of the Admiralty business as they also did in the South African War.

Q. Having received that telegram on the 31st March did you on the same day reply to Messrs. Harley & Company by letter? A. This is a copy taken from our letter book.

Mr. Le Quesne: I object to this as Harley & Company were agents of the defendants and the original could have been obtained.

By Mr. Raeburn.

Q. Were Harley & Company acting as your agents? A. Not when they sent that telegram; they were quoting on behalf of the Admiralty.

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Mr. Le Quesne: I submit the original should be procured in any event.

By Mr. Raeburn.

Q. On the 1st April did you receive a letter from Messrs. Harley & Company? A. Yes, the original is here.

Q. Dealing further with the question of the taking up of the vessel by the Admiralty? A. We did.

Q. That letter speaks for itself. On the same date did you receive a letter from another firm in London, Messrs. Hogg & Robinson? A. Yes, we received it, as far as I recollect, on the 2nd April. It is dated the 1st.

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Q. Have you the original of that?

(It was here arranged between counsel and solicitors that the correspondence should be agreed put in and marked S. C. H. 2.)

Q. How did Messrs. Hogg & Robinson come into it? A. They were Admiralty agents. Their paper is headed "Admiralty Shipping Agency." They represent the Admiralty in the city for procuring

tonnage and arranging shipments of stores for the government.

Q. And their purpose was to get the vessel for the government for the purpose of carrying hay, apparently? A. Yes.

Q. On the 2nd April you replied to that letter of Messrs. Hogg & Robinson and you only have a copy here? A. Yes.

Mr. Le Quesne: I take the same objection.

By Mr. Raeburn.

149 Q. I need not take up time by reading it. On the 2nd April, did you write to Harley & Company?

Mr. Le Quesne: The same objection applies to this.

A. Yes, we wrote to them on the 2nd April.

Q. You say: "We have heard nothing from the Admiralty and it looks as if they would leave this vessel alone." That is referring to the *Baron Ogilvy*? A. Yes.

Q. On the 3rd April did Messrs. Hogg & Robinson write to you again? You have the original of that? A. Yes.

150 Q. And to it you appear to have replied on the 6th April?

Mr. Le Quesne: I take the same objection.

By Mr. Raeburn.

Q. There, for the first time, you mention the *Baron Ogilvy*? A. We received their letter of the 3rd on the 6th.

Q. You replied, saying you had no vessel of the type they required in or shortly due in this country

with the exception of the *Baron Ogilvy* that was then in Millwall dock? A. They asked us to state if we had any vessels of that type available, and replied that we had none except the *Baron Ogilvy*, which was then in Millwall dock and chartered to load in the States.

Q. That you specifically pointed out to them? A. Yes.

Q. On the 7th April, comes another letter from Messrs. Hogg & Robinson, which you received on the 8th, I suppose. Have you the original? A. Yes.

Q. In which they state the *Baron Ogilvy* is suitable for their requirements, and they ask you to keep them posted as to her position "as it is quite possible by that time that it will be found necessary to requisition her for government service for the purpose we have named," and so on? A. Yes.

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Q. On the 9th April did you write again to Messrs. Harley & Company?

Mr. Le Quesne: I take the same objection.

By Mr. Raeburn.

Q. Stating you had intimated to Messrs. Hogg & Robinson that the vessel was committed for further business and pointing out that she was fixed for oil from the States to the Cape and thereafter from New Caledonia home? A. I think there is an omission here. I think there were two telegrams received from Messrs. Harley on that date. I produce the original of one.

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Mr. Le Quesne: I object to copies.

By Mr. Raeburn.

Q. Which is the original? A. "*Baron Ogilvy*. We regret to inform you Admiralty say must requisition this steamer."

Q. On the 9th April did you receive two telegrams from Messrs. Harley & Company? A. We did.

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Q. Was the first as follows: "*Baron Ogilvy*. We regret to inform you Admiralty say must requisition this steamer for Country's need. Telegram of Requisition is being prepared and you will receive same later. Evenhanded." A. That is the telegram we got.

Q. Did you later in the day receive another telegram from Harley & Company, "*Baron Ogilvy* referring Admiralty Notice requisition we believe could induce them take her instead for three or four trips New Orleans Avonmouth or Liverpool Fourteen pounds namely Thirteen pounds ten and ten shillings gratuity shall we try do so"? A. That was the second telegram.

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Q. On the same day did you write to Messrs. Harley & Company the letter as follows: "We have received your two telegrams of this afternoon and we confirm our telegram in reply. We have intimated to Hogg & Robinson that the vessel is committed for further business, but probably the requisitioning arrangement which you refer to will be that of another department, and it will be as well to make them clear, that the vessel is fixed for oil from the States to the Cape and thereafter from New Caledonia home. Meantime, of course, we have not received a requisitioning telegram and cannot move in the matter."

Mr. Le Quesne: I object to that on the ground that it is not the original.

A. Yes.

By Mr. Raeburn.

Q. On that same day did Harley & Company write you a letter which you would receive on the 10th? A. Yes.

Q. "S/S *Baron Ogilvy*. We are sorry that we have had to advise you to day that the Admiralty inform us that they require this steamer for the needs of the country. A formal telegram of requisition is being prepared and you will receive it in due course. It is very regrettable that the Admiralty requirements are such that they must have this steamer seeing the many other boats of yours they have requisitioned but apparently the position cannot be helped. We believe you will appreciate that our Government would not needlessly disturb any steamer's commitments if they could avoid it. Yours faithfully, Harley & Co." A. Yes. 158

Q. On the same day did Messrs. Harley & Company write you again: "S/S *Baron Ogilvy*. Since writing we have your telegram and note contents. We do not know why Messrs. Hogg & Robinson should trouble you. The Department they follow is quite distinct from the Department we follow," and so on. I need not read it all. That was the 9th. Now on the 10th April did you receive a telegram from the Admiralty signed "Transports"? A. Yes, early in the morning of the 10th, I think it was despatched the previous night. 159

Q. "Hogarth Glasgow S/S *Baron Ogilvy* is requisitioned under Royal Proclamation for Government Service Transports"? A. Yes. That is the original telegram.

Q. Now you have told me that you have had a considerable number of vessels requisitioned from time to time? A. Yes.

Q. Is that the usual form in which they requisition them? A. It generally came in that way.

Mr. Le Quesne: I object to that unless the telegrams are produced.

By Mr. Raeburn.

Q. Then the last is on the same day, the 10th April. You wrote on that day to Messrs. Hogg & Robinson: "Dear Sirs s.s. *Baron Ogilvy*. We duly received your favour of the 7th instant. The information you have received respecting this vessel from the Millwall Dock Authorities is approximately correct," and so on. And then you intimate to them that you received formal notice of requisition from the Director of Transports and thought the vessel was intended for the carriage of mules? A. Yes.

Mr. Le Quesne: I object to that because we should have the original.

By Mr. Raeburn.

Q. After that were certain alterations of a minor character made on the vessel, and did she leave London for the purpose of proceeding to the States? A. Yes, under requisition.

Q. I think she left London on the 15th April. A. About that date, I cannot recollect.

Q. In what manner was she employed by the Admiralty under the requisition? A. In carrying mules from the Southern States to England.

Q. And how long did she remain under requisition continuously? A. I think, till the following November, seven months.

Q. November, 1915? A. Yes.

Q. Incidentally, do you recollect how many voyages she performed for the Admiralty during that period? A. I think four round voyages.

Q. And no voyages for you at this period? A. No.

Q. That is to say no voyages for the Hogarth Shipping Company? A. No.

Q. Suppose she had not been requisitioned and had proceeded in due course to Port Arthur, Texas, to load under the Texas Company's charter, and had loaded and proceeded to the port of discharge between Cape Town and Delagoa Bay to whatever port might have been declared, how long would that voyage have taken? A. Roughly speaking, three months.

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Q. Up to the time of discharge of the cargo in South Africa? A. Fully three months, perhaps three and a half months.

Q. The rate you were going to receive from the Texas Company is shown in the charter-party at 47 cents one port discharge? A. Yes.

Q. How would your profits under that charter have compared with the profits that you actually made if you made any while the vessel was under requisition to the Admiralty? A. The profits under the oil charter would be infinitely more than the profits under the requisition.

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Q. It is almost unnecessary, then, to ask which you would have preferred to do, perform the Texas Company's charter or the requisition of the Admiralty? A. I think the correspondence brings it out that we did everything possible to escape requisition.

Q. Was there anything you left undone that you could have done to keep your vessel off the requisition? A. No.

Q. Now, you have had considerable experience as a British ship owner: is there any means of disobeying an Admiralty requisition? A. I have never found any; and many a time I would have liked to disobey them.

Q. But you have never been daring enough to try? A. No.

Q. Now I have to put this question to you: Are all members of the firm of H. Hogarth & Sons British subjects? A. They are.

Q. Has the firm of H. Hogarth & Sons any office in the United States of America? A. No.

Q. Has the Hogarth Shipping Company, Limited, any office in the United States of America? A. No.

Cross-examination by Mr. Le Quesne.

Q. At the time of the charter was this vessel owned by the Hogarth Steamship Company? A. She was.

Q. And at the time of the requisition? A. She was.

Q. She was never owned by you? A. She was built by the Hogarth Shipping Company and never owned by anybody else.

Q. That is the correct name? A. Yes.

Q. She was never owned by Hugh Hogarth & Sons? A. Never.

Q. Then the charter-party is incorrect when it states "A first class steam vessel owned by Hugh Hogarth & Sons"?

Mr. Raeburn: I object to that, as no such point is made in the libel.

By Mr. Le Quesne.

Q. That statement in the charter-party is incorrect that the vessel to be declared under the charter-party was a first-class steam vessel owned by Hugh Hogarth & Sons? A. Hugh Hogarth & Sons own no vessels.

Q. They owned no vessel at any material time? A. At any material time they did not.

Q. In fact, they entered into this charter-party merely as agents for the Hogarth Shipping Company? A. That is right.

Q. Although I think they are not described as agents? A. These American charter-parties are all made by cable; and it is often weeks after they are made before copies come forward and an inaccuracy of that sort is of no material importance; nobody bothers about it. 170

Q. That is as may be; but I am correct in saying Hugh Hogarth & Sons, though they contracted as agents, are not described as agents? A. No.

Q. The charter was made with their authority? A. Yes.

Q. And they in their turn were acting with the authority of the Hogarth Shipping Company? A. That is correct.

Q. Will you give me the names of the members of the firm of Hugh Hogarth & Sons as it existed at the time of the charter? 171

Mr. Raeburn: I object to that as wholly immaterial.

A. Samuel Crawford Hogarth, myself, and my brother Hugh Hogarth is the junior partner.

Q. Were those the two partners at the time of the charter? A. Yes.

Q. And at the time of the alleged requisition?
A. Yes.

Q. Now, the requisition was made merely by the telegram which you received on the 10th April: "Hogarth, Glasgow, Steamship *Baron Ogilvy* is requisitioned under Royal Proclamation for Government Service Transports"? A. As far as I know, it is.

Q. I think it is usual, is it not, to receive a letter also from the Admiralty saying that the vessel had been requisitioned? A. It is usual. We have received letters three or four weeks after the telegram and after the steamer has been on service for weeks.

Q. Did you receive any such letter in the case of this steamer? A. No.

Q. And you considered that the telegram by itself was a formal requisition of this steamer? A. Undoubtedly.

Q. Was it never confirmed to you in any document from the Admiralty? A. It was confirmed in the document in which it was arranged that the steamer was to carry mules on a head basis instead of on a T. 99 form.

Q. Are those documents here? A. I think not.

Q. Will you undertake to produce them? A. Yes.

Q. Then I call for them. Did you sign T. 99?
174 A. No.

Q. Now, you have had considerable experience of the requisitioning of vessels by the Admiralty? A. Unfortunately, I have.

Q. I assume you are acquainted with the Proclamation under which that requisition is done? A. More or less.

Q. Are you aware that it authorizes the Admiralty to requisition vessels under the hand of their

Secretary or under the hand of any Flag Officer?

A. I am not.

Q. Was any such warrant issued as far as you know in this case? A. No.

Q. Did you ever require any such warrant to be issued? A. No.

Q. Why not? A. I did not know there was any necessity. I took the "Transports" telegram as authority to act.

Q. You knew that this vessel was chartered by you to the Texas Company? A. Assuredly.

Q. And it was your business as far as you could give them the user of this vessel? A. Certainly we wanted to.

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Q. If what purported to be a requisition was not a proper requisition it was your duty to hand this vessel over to the Texas Company and disregard it?

A. I am not a lawyer and I cannot tell if a telegram sent off from the Transports Department of the Admiralty is sufficient or not; but it was sufficient authority for me to act upon.

Q. It was all you acted upon? A. It was all I acted upon, yes.

Q. Now, you have a document, T. 99, showing the terms on which this vessel was to be used by the government? A. No, I cannot say I have. T. 99 form, which the government try to shove down owners' throats as the terms on which they will requisition, as far as I know, no owner has ever agreed to.

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Q. Now, you have received hire from the government in respect of this vessel? A. Quite so, yes.

Q. Was that the hire provided for by the Blue Book rates? A. No.

Q. Was it the result of a special bargain between you and the government? A. Yes.

Q. Is that special bargain contained in the letters you are going to produce? A. Yes.

Q. Have you made any claim against the government in respect of this vessel other than a claim for hire? A. No.

Q. There has been no need for any repairs or reconditioning or restoring the vessel to her original state for which you have made a claim against the government? A. No.

Q. She carried mules, you tell us? A. Yes.

Q. Were not structural alterations made for that purpose? A. Some interior fittings were put up and were removed by us.

179 Q. But you charge the government nothing for that? A. No.

Q. Did not the government undertake to indemnify you against third party claims? A. Yes.

Q. By what did they give you that undertaking? By the letters you are going to produce? A. That is so.

Q. Have you as yet made any claim against them under that clause? A. No, but we have intimated this claim.

Q. Now, have you at any time considered whether or not the prerogative of the Crown entitles the Crown to take a vessel and use her in this way?

Mr. Raeburn: I object to that question, as it is not a question for the witness, but for a lawyer.

By Mr. Le Quesne.

Q. Have you at any time considered whether or not the prerogative of the Crown entitled the Crown to take a vessel and use her in this way? A. No.

Q. You never suggested that the Crown had no power to take your vessel for such a purpose? A. I never suggested that.

Q. Did you ever suggest that the Crown, even if they had a power to take your vessel, had no power to compel you to give them the use of your crew? A. No.

Q. Now, the vessel was requisitioned by the telegram which has been put in? A. Yes.

Q. What effort did you make to induce the Admiralty not to requisition this vessel? Did you make any? A. Not except to Harley & Company, and Hogg & Robinson.

Q. The sum total of your efforts in that direction is to be found in the documents which have been put in by my learned friend Mr. Raeburn? A. That is so.

Q. You did nothing more than appears in those letters and documents? A. That is so, yes.

Q. You never tried to induce the Admiralty to accept another vessel instead of the *Baron Ogilvy*? A. We did not. We had no other vessel.

Q. But the whole of your fleet was not requisitioned? A. The unrequisitioned part was not available.

Q. Not immediately available? A. No.

Q. Some would have been available shortly after this date? A. I cannot recollect, but I do not think some would have been available for some months. We were endeavoring to keep them away from this country as much as possible to avoid requisitioning.

Q. Are you sure there were none available or which would shortly be available? A. I am not. I would need to look up my diaries and the itineraries of the different steamers; but from the correspondence, I think it is clear that no steamer was coming here but the *Baron Ogilvy*.

Q. You have not looked up your diaries before you came here to-day? A. No.

Q. It is true to say, is it not, that the requisitioning of this vessel protected the remaining steamers of your fleet? A. Unfortunately, it is not true.

Q. But you hoped it would be true at the time this vessel was requisitioned? A. I had an idea that the more vessels the Admiralty requisitioned the less likelihood there was that the balance would be requisitioned.

Q. The rates for steamers were rising steadily all this time? A. I do not recollect.

185 Q. This requisitioning took place on April 15th? A. Yes.

Q. I put it to you that a ship owner of your experience who has been so closely in touch with the chartering market in this country from the beginning of 1915 knows that the rates rose steadily?

A. Generally speaking, there was a steady rise all the year, but there may have been a period when they did not.

Q. The chances were that if the Admiralty requisitioned a steamer in April that steamer would be worth less to her owners in the market than a steamer which the Admiralty might requisition in June? A. That is quite possible.

186 Q. From that point of view it was in the owner's interest the requisition should fall upon him in April rather than in June? A. Not necessarily.

Q. It is also true that you had contracts with the Tharsis Company and the Alkali Company for the carriage of copper ore? A. Those refer to the small Spanish steamers owned by the Kelvin Company.

Q. I suppose you would be able to plead more effectively with the Admiralty for the protection of those steamers needed for the fulfillment of those contracts if seven of your steamers had al-

ready been requisitioned? A. No. I think those contracts speak for themselves. They allowed the small vessels not to be requisitioned in order to enable us to carry out these contracts.

Q. You were solicitous that these contracts with the Tharsis Company and the Alkali Company should be carried out? A. No, we did not want to carry them out, but we had to.

Q. I suggest you were solicitous of doing so and thought the requisition of this steamer would cause the steamers you wanted for the Tharsis Company and the Alkali Company to be left alone? A. No, I do not think that.

Q. Could you not have pointed out to the Admiralty that you had a considerable portion of your fleet already requisitioned and it was unfair that this further steamer should be taken in view of her commitments? A. I had been doing it for months.

Q. In what way? A. Verbally, frequently.

Q. Did you repeat those protestations when the suggestion was made that the Admiralty were going to take this steamer? A. You mean the suggestion by Hogg & Robinson?

Q. Yes. A. The correspondence speaks for itself.

Q. You have nothing to say beyond what appears on the correspondence? A. No.

Q. Now, it is true that the Admiralty had requisitioned two steamers, the *Baron Yarborough* and the *Baron Kelvin*, and that, I think, is mentioned in your letter of the 2nd April to Hogg & Robinson? A. Yes.

Q. You made special efforts to secure the release of those two vessels? A. We pointed out that it would imperil the carrying out of the Tharsis and Alkali Companies' contract, and as the government were anxious that the maximum amount of pyrites

of copper should be brought into this country they released the ships.

Q. Did you make any special efforts to release these vessels? A. Nothing further than to point out the trade the vessels were being employed on and the contracts that were running with them.

Q. Now, I suggest that you might have taken up this matter of the *Baron Ogilvy* much more energetically if you had been really anxious to discharge this contract. Is it your statement that you could have done more than is represented by these few letters? A. Nothing more, in my opinion, would have had any effect. I had no argument with which to go to them. It was not the government interest to carry a cargo of oil, whereas it was very much to the government interest that we should go on carrying cargoes of pyrites to this country.

Q. You told us that a large proportion of your fleet had been requisitioned at this time? A. We thought it was at the time, but it has turned out not to be.

Q. Do not you think you could have written and pointed out more emphatically that the requisitioning of your steamers was out of proportion to the requisitioning of other steamers? A. We had been doing so.

Q. Did you suggest to the Texas Company you would try to nominate another steamer for them?

Mr. Raeburn: I object to that, as it involves a question of law which the witness is not competent to answer.

A. We did not.

By Mr. Le Quesne.

Q. When was this steamer released? A. I think the middle of November, 1915.

Q. Did you then tender her to the Texas Company? A. No.

Q. Why not? A. Because I considered we had no liability to the Texas Company.

Q. Have you any account showing what profits you made whilst this steamer was employed on government service? A. No.

Q. Can you give me any idea what those profits were? A. I suppose, at that time the vessel on government service would be making about £500 per month, on requisition service. 194

Q. What do you suggest she would have made under this contract? Have you worked it out? A. I probably did at the time. I should say she would probably make about £1,500 to £2,000 per month under this contract.

Q. Can you give me any figure? A. I am only speaking very approximately. I think the vessel would have made between £1,500 and £2,000 per month carrying the oil from the time she left this country.

Q. Did you ever apply for this vessel to be released before she was released? A. No.

Q. You never sought to obtain the release of this vessel a little earlier so that she might be tendered again to the Texas Company? A. No. 195

Q. I understand from your pleadings in this action that you rely upon the clauses which were attached to the charter-party. Are you aware of the nature of your pleadings? A. I am afraid I am not.

Q. At any rate you are acquainted with the clauses that are attached to the charter-party? A. Yes.

Q. And well acquainted with both these, the one which relates to the clauses to be attached to the bill of lading and the other headed, Voyage Charter Special Clause? A. Yes.

Q. Will you agree with me those are all of them clauses applying to events which may occur during the performance of the charter-party?

Mr. Raeburn: I object to that question on the ground that the witness is not a lawyer.

By Mr. Le Quesne.

197 Q. Do you agree with me? A. No, I am not a lawyer.

Q. I ask you not as a lawyer but as a ship owner. Do you not agree these clauses relate to events which may occur during the performance of the charter-party? A. I have never studied these clauses from this point of view.

Q. From what point of view? A. A general point of view.

Q. Of a ship owner? A. Yes.

Q. Now, do not you agree with me that these clauses relate to events which may occur during the performance of the charter-party?

198 Mr. Raeburn: I object to the witness being pressed to answer questions which are not for him.

A. I cannot say I am quite sure they would relate only to events that would occur during the charter-party.

By Mr. Le Quesne.

Q. Now, on your behalf an objection is taken to the jurisdiction of the American court. Were you acquainted with that? A. No, I was not.

Q. Now that you have that piece of information, I would like to draw your attention to one of two things in the charter-party. This was a charter made in New York?

Mr. Raeburn: I object to the question on the ground that the charter-party speaks for itself.

A. I believe so.

By Mr. Le Quesne.

Q. By your agents in New York? A. Yes.

Q. For a voyage from an American port? A. 200
Yes.

Q. I think that by clause 22 of it, it is subject to the maritime rules of the New York Produce Exchange?

Mr. Raeburn: I object to that question on the ground that it is not for the witness and is waste of time, and unnecessarily incurring extra expense.

A. That appears to be correct.

Q. And also by clause 23 of the Harter Act? A. Yes.

Q. You also rely on your pleadings upon a certain act known as the Defence of the Realm Act 1915, and that Act you must accept from me, subject to Mr. Raeburn's correction, relates to an interference with the contracts which arise from the necessity of complying with any requirements, regulations, or restrictions of the Army Council under the Defence of the Realm Act. My question is this: You agree with me that this vessel was requisitioned under the Proclamation of the 3rd of August, 1914? 201

Mr. Raeburn: I object to that question on the ground that the witness cannot say and it is for the Admiralty, and not the witness.

A. I cannot say.

By Mr. Le Quesne.

Q. Are you of opinion that she was requisitioned under anything other than the Proclamation of the 3rd August, 1914?

Mr. Raeburn: I object to that question on the ground that the witness cannot say.

A. I cannot say, as I am not competent to answer.

By Mr. Le Quesne.

Q. I ask your opinion on the matter?

Mr. Raeburn: I object to the witness' opinion being asked.

By Mr. Le Quesne.

Q. You may decline to answer, and it will be put on the note. A. I decline to answer, as I do not feel competent to answer the question.

Q. A letter from you to Messrs. Harley of the 9th April, 1915, or a copy of it, refers in its paragraph to a telegram sent by you in reply to their two telegrams of the 9th April. I should like to see that (it was produced). Will you look at the copy of your letter of the 9th April to Messrs. Harley? A. Yes.

Q. In the first paragraph there is a reference to "our telegrams in reply"? A. Yes.

Q. Is this document which has just been handed to me by the solicitors acting for the respondents a correct copy of that telegram? A. I cannot say it is a correct copy. It appears to me to be a correct copy.

Q. Will you enquire for the original from Messrs. Harley? A. I have no doubt Mr. Harley will be able to produce it.

Re-examination by Mr. Raeburn.

Q. You said in answer to my learned friend that the Admiralty telegram was all that you acted upon? A. That is so.

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Q. I do not know quite what you mean by "acted upon." Did you act or the Admiralty act? A. The Admiralty acted. We regarded that telegram as the final requisition of the ship.

Q. That was after the telegram was received as far as you were concerned? A. I think we telegraphed to Mr. Harley on Mr. Harley's suggestion of the previous afternoon.

Q. But you can act on a telegram by doing something or doing nothing—both the sender and receiver. What did you do in reference to the steamer after the telegram was received? A. Nothing immediately after the telegram was received.

Q. It is suggested that you took no steps to tender her to the Texas Company? A. No, we did not.

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Q. That would have involved sending her out to Port Arthur and tendering her there? A. Yes.

Q. What did the Admiralty do? Your ship is lying in London; you receive a telegram saying she is requisitioned. What happened after that as far as the steamer is concerned? A. The Admiralty notified us of the requirements for the carriage of

mules which we knew as a matter of fact through Mr. Harley and we agreed to the requirements and the rate they offered us per head. We thereupon fitted the vessel up with wireless telegraphy and did other things.

Q. Who told you where to send the vessel? A. The Admiralty.

Q. Now these Tharsis and Alkali Companies' contracts were for the carriage of copper ore? A. It was the sulphur that was important in that cargo to be used for high explosive.

209 Q. Were these contracts that it was to your interest to carry? A. These contracts were then at about a third of the current rates.

Q. Were they pre-war or post-war contracts? A. Mostly pre-war.

Q. Contracts, at all events, made before January, 1915? A. Yes.

Q. And freights were rising from January, 1915, onwards as my learned friend put it to you? A. Yes, more or less.

Q. You have referred in this letter to the *Baron Yarborough* and the *Baron Kelvin* being released; were they two of the smaller ships? A. Yes.

Q. Which you used for the carriage of pyrites? A. Yes.

210 Q. Was the *Baron Ogilvy* a vessel you would use for the carriage of pyrites? A. No, she was much too big.

Q. I think you said to my learned friend in cross-examination that you had had considerable experience of requisitions of the Admiralty before this date? A. Yes.

Q. Have you had experience of endeavoring to get vessels released by the Admiralty? A. Yes.

Q. Have you considered you had any argument worth putting forward to the Admiralty in respect

of the *Baron Ogilvy* to get her released? A. No, I considered I had no argument; I could not plead it was in the national interest that a cargo of oil should be carried from the States to the Cape.

Q. You gave the profit you would have made per month under the Texas Company's charter? A. Very approximately.

Q. At the rate you were being paid per for mules by the Admiralty, what did you make per month?

A. A little more than we should have got at the 11s. Blue Book Rate, probably £600 or £700 per month.

Q. As compared with £1,500 to £2,000? A. Yes, carrying oil the steamer would have loaded 180,000 cases at 2s. per case and, roughly, that is £18,000, she would have left about £7,000 profit on the oil voyage.

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Q. And in three months of Admiralty requisition on the terms on which you were what was the profit?

A. I can speak more accurately on Blue Book Rates, and this we considered a little better. On Blue Book Rates she would have made £500 a month, but we took a lot of responsibility and trouble in providing muleteers and quarters and we got £100 more.

Q. Did you make a considerable loss by having the vessel requisitioned? A. A very great loss.

Q. It is suggested you refrained from taking measures to get the *Baron Ogilvy* free because it was to your interest in some other way, to have her requisitioned. Is there a word of truth that your personal interest or the interest of your company came into the matter at all? A. No.

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Further cross-examination by Mr. Le Quesne.

Q. If you carried out the charter with the Texas Company you would have had to bear the war risks? A. Undoubtedly.

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Deposition of S. C. Hogarth—Recross.

Q. The government themselves bore the war risk while the vessel was employed by them? A. Yes.

Q. What difference did you allow for that? A. I counted that in the figures I gave. The only war risk was on the voyage out. The war risk on the voyage from Port Arthur to the Cape was really no risk and the rates were very low. It was an unimportant question.

Q. You have made, you say, an allowance for the war risk you would have had to bear yourself? A. Yes.

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(Counsel and solicitors agreed to waive the reading over to and the signature of this evidence by the witness.)

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE TEXAS COMPANY,
Libelant,

against

HOGARTH SHIPPING COMPANY,
LIMITED, as owners of the
Steamship *Baron Ogilvy*, and
HUGH HOGARTH & SON,
Respondents.

In Admiralty.

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Depositions of witnesses taken at London, on Commission, on the 31st January, 1918.

CHARLES ROBERTSON DUNLOP, sworn as a witness on behalf of the respondents, testified as follows:

Examined by Mr. Racburn.

Q. Mr. Charles Robertson Dunlop, you are a member of the English Bar? A. Yes.

Q. And your various qualifications, I think, are stated in a memorandum which you have been good enough to prepare, setting out the law of England in regard to the subject of requisitioning of ships? A. Yes.

Q. And the exercise of the King's prerogative in that and certain other respects? A. Yes.

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Q. I think you are prepared to put in for convenience sake a copy of the statement that you have made? A. I am.

(Document produced and marked "C. R. D. 1.")

Q. I think there are one or two questions which I ought to ask you upon this. You refer, in the course of your statement, to the Proclamation of the 3rd August, 1914, with regard to the requisitioning of ships? A. Yes.

Q. Do you produce a copy of that Proclamation? A. I do.

(Document produced and marked "C. R. D. 2.")

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Q. Another matter is this, have you been shown the documents by which this ship was in fact requisitioned? A. I have.

Q. I see the word "documents" in the plural. In point of fact I think the actual requisition was done by a telegram, I understand, was it not? A. I understand so.

Mr. Le Quesne: Do I understand you do not contend that she was requisitioned by anything other than the telegram?

Mr. Raeburn: I only speak from the document I have got; I cannot give evidence in the matter. The only document I have is first the telegram of the 10th April, 1915, signed "Transports," sent from the Admiralty to Hogarth, Glasgow: 'S.S. *Baron Ogilvy*' is requisitioned under Royal Proclamation for Government services."

By Mr. Raeburn.

Q. In order that you may see it, that I understand was the original document (handed)? A. Yes.

Q. Are you familiar with that class of telegram where ships have been requisitioned? A. I am, I have seen them frequently.

Q. In your view, does a requisition by a telegram in that way constitute a valid and effectual requisitioning of the ship? A. It does.

Q. And a valid exercise of the King's prerogative? A. Yes.

Q. The telegram from Transports to Hogarth, Glasgow, is in the bundle which was produced to Mr. Hogarth. Then in addition to that, have you been shown a letter from the Admiralty dated the 15th April, 1915, dealing with the terms and conditions under which the vessel was to be run for the government? A. I have; I think the telegram would be sufficient without the letter.

Q. At the conclusion of your statement I think you wish to add two references? A. Yes. With reference to the doctrine of the frustration of the adventure by reason of the requisitioning, I should like to refer to the decision of Mr. Justice Atkin in

the case of *Lloyd Royal Belge Societe Anonyme v. Stathatos*, which at present is only reported, as far as I know, in 33 Times Law Reports, page 390. This decision has recently been affirmed by the Court of Appeal. The judgment of the Court of Appeal is not yet reported, but I expect it will be in due course. In the case that I have referred to Mr. Justice Atkin adopted with approval the definition of the doctrine of frustration of Mr. Justice Bailhache in *Admiral Shipping Company v. Weidner Hopkins & Company*, reported in, 1917, I King's Bench at page 242, a definition which was approved by the Court of Appeal in the *Admiral Shipping Company's* case. What Mr. Justice Bailhache said was that the commercial frustration of an adventure by delay meant the happening of some unforeseen delay without the fault of either party to the contract, of such a character as that by it the fulfillment of the contract in the only way in which fulfillment is contemplated and practicable is so inordinately postponed that its fulfillment when the delay is over will not accomplish the only object or objects which both parties to the contract must have known that each of them had in view at the time they made the contract, and for the accomplishment of which object or objects the contract was made.

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Q. Is that all that you desire to say upon that case? A. Applying the doctrine of frustration as there defined to the facts of the same in *Lloyd Royal Belge Societe Anonyme v. Stathatos*, Mr. Justice Atkin said that the detention by the British Government for reasons of State, which would not be fully known to the parties, and for a period, the duration of which must be uncertain and might be prolonged appeared to him to be just such a

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delay as falls within the doctrine as defined in the words he had quoted.

Q. Now, I want to ask you generally does your statement that you have been good enough to prepare, to the best of your knowledge, set out accurately the law of England upon the subject with which it deals? A. In my opinion, it does.

Q. I do not know whether it has been brought to your attention that in this case no express exception of restraint of princes appears in the charter-party which is sued upon. What, if any, effect would the fact that that exception does not appear have upon your view of the effect of the requisitioning of this ship upon the contract? A. In my opinion, the absence of the usual exception of restraint of princes makes no difference to the effect in English law of the requisitioning of the ship.

Q. Could we have one example of a case in which a requisitioning, not necessarily of a ship, by the British Government, has been held by our courts here to excuse non-performance of a contract, although there was no exception in the contract dealing with the matter? A. Yes, the case of *Shipton Anderson & Company v. Harrison Brothers & Company*, reported in 1915, 3 King's Bench, page 676, is a case which, in my opinion, establishes that the effect of the requisitioning of the *Baron Ogilvy* by the British Government was to relieve the owners of any obligation to perform the charter-party, or to pay damages for not performing it, and the effect of the requisition was to put an end to the charter-party. I have set out in my opinion the effect of the *Shipton Anderson & Co. v. Harrison Brothers*, and the relevant expression from the judgments of the Court, and particularly the illuminating judgment of Lord Reading, Lord Chief Justice.

Q. Upon a point which is not dealt with specifically, I think, in your statement, just a question or two. Since the war broke out has the Legislature provided from time to time certain statutory defences to persons sued for non-compliance or non-performance of contracts, where non-performance has been prevented or hindered by government requirements. A. It has; in the first place by the Defence of the Realm (Amendment) Number 2, Act 1915.

Q. Copy of which you are good enough to produce? A. Yes.

(Document produced and marked "C. R. 230
D. 3.")

It is the 5th George V., Chapter 37. That provides in subsection 2 of Section 1: "It is hereby declared that where the fulfillment by any person of any contract is interfered with by the necessity on the part himself or any other person of complying with any requirement, regulation, or restriction of the Admiralty" * * * "under the Defence of the Realm Consolidation Act, 1914, or this Act, or any regulations made thereunder, that necessity is a good defence to any action or proceedings taken against that person in respect of the non-fulfillment of the contract so far as it is due to that interference."

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Q. Having regard to the terms of that section, suppose this action had been brought in an English court, in your view, would that section of itself afford a defence? A. No, in my opinion, it would not, but in my view the sub-section is declaratory of the rule of common law.

Q. In addition to that act which you have been good enough to refer to, has there been passed another act giving statutory defence? A. Yes.

Mr. Le Quesne: I object to this. This act is not pleaded, and no issue relating to it is raised on the pleadings.

By Mr. Raeburn.

Q. Will you please answer? A. The act to which I am about to refer is the Courts (Emergency Powers) Act 1917, of which I produce a print; it is the 7th and 8th George V, Chapter 25.

(Document produced and marked "C. R. D. 4.")

Q. The relevant section is number 3? A. Yes. By Section 3 of that act it is provided that: "Where, before or after the passing of this Act, the non-fulfillment of any contract (not being a contract of tenancy) was or is due to the compliance on the part of any person with any requirement, regulation, order or restriction of any Government department or of a competent naval or military authority made, issued, given or imposed for purposes connected with the present war, or with any direction or advice issued or given by any Government department with the object of preventing transactions which, in the opinion of the department, would or might be contrary to national interests in connection with the present war, proof of that fact shall be a good defence to any action or proceeding in respect of the non-fulfillment of the contract."

Q. In your view, if this action has been brought, and were now to come on in an English court, would that section afford a statutory defence? A. In my opinion, it would.

(It was arranged that the cross-examination of this witness should be proceeded with on a subsequent day to be fixed.)

ERNEST JULIAN FOLEY, sworn as a witness on behalf of the respondents, testified as follows :

Examined by Mr. Raeburn.

Q. Ernest Julian Foley, are you Director of Military Sea Transport? A. That is so.

Q. And at the time of the requisitioning of the *Baron Ogilvy* in April, 1915, were you Assistant Director (Military) to His Majesty's Director of Transports? A. That is so.

Q. Is the Director of Transports the head of that department of the British Admiralty which deals with all questions of transport and requisition? A. It should be sea transport; it does not apply to land transport. 236

Q. Under the directions of the Lords Commissioners of the Admiralty? A. Yes.

Q. I think the actual office of Director of Transports was constituted many years ago, long before this war? A. Yes, many years ago.

Q. The Lords Commissioners act in all matters regarding requisition of ships through the Director of Transports? A. In all matters.

Q. Do the Lords Commissioners of the Admiralty form a branch of the executive government? A. They do.

Q. And do they exercise the power of the Crown as regards naval matters? A. They do. 237.

Q. I think they are constituted under certain Acts of Parliament which are known generally as the Admiralty Acts? A. Yes, and under a Patent; I think the actual Admiralty Board of any moment is created by a Patent.

Q. In the month of April, 1915, and for some time before that, had the British Government been in

urgent need of tonnage? A. Very urgent, indeed.

Q. For what purpose? A. Military and naval purposes.

Q. In connection with the present war? A. The carrying on of the war.

Q. Did you, in order that you might supply the urgent needs of the government, acquire from time to time particulars as to the movements of the various ships comprising the British Mercantile Marine? A. We did.

Q. Had you information amongst others as to the movements of the vessels belonging to the Hogarth Shipping Company, and managed by Messrs. Hogarth & Sons? A. Yes.

Q. Were you aware that the *Baron Ogilvy* was expected to arrive in London towards the end of March, 1915? A. Yes, I was aware of that.

Q. I think you had been in touch with Messrs. Harley & Company, who were acting as the owners' agents in London? A. Yes, that is so.

Q. Did Messrs. Harley & Company inform you of the nature of the employment which the *Baron Ogilvy* was fixed to take up after her arrival on this side? A. Yes, they did.

Q. What was the employment? A. I can refer to notes, I suppose, because these are all matters of memory?

Mr. Le Quesne: Was it conversation or writing?

By Mr. Raeburn.

Q. Did Harley & Company come and see you, or did you communicate with them in writing? A. They saw us; the greater part of the work was done by personal interviews.

Mr. Le Quesne: Is a representative of Messrs. Harley being called?

Mr. Raeburn: I do not know; not to-day, certainly.

Mr. Le Quesne: In that case I must object to this evidence as hearsay.

By Mr. Raeburn.

Q. I will put it in this way: So far as your information went, what was the future employment of the vessel about to be?

(Question objected to.)

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A. She was to go to Port Arthur to load for certain ports in the Cape under charter-party arranged by Messrs. Hogarth with a firm whose name I do not know.

Q. Did you know what she was to carry? A. To load oil.

Q. Before the date when the vessel was actually requisitioned had you any request from the owners or Messrs. Harley that she should not be taken?

(Question objected to.)

A. We had.

Q. What treatment, in effect, did this question receive? A. We did as we did with everybody; we listened to what they had to say and did our best to avoid hardship, but we needed the ships, we needed the prompt ships, we needed the suitable ships, and therefore we took them.

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Q. In those circumstances was it found essential to requisition the *Baron Ogilvy*? A. Yes. This ship was particularly suitable for our services; we wanted her for the carriage of mules.

Q. I think, in the result a requisitioning telegram, dated the 10th April, 1915, which is referred to in Mr. Dunlop's evidence, was sent by you to Messrs. Hogarth in Glasgow? A. That is so.

Q. Acquainting them that the vessel was requisitioned? A. Yes.

Q. Since the outbreak of the war, I need scarcely ask, you have requisitioned a very large amount of British tonnage? A. A very large amount.

Q. Is the method of requisitioning that was adopted in this case, namely, the sending of a requisitioning telegram, the method you adopted in other cases? A. Exactly the same.

245

Q. In all other cases? A. Yes, in all other cases.

Q. In certain other cases I think I am right in saying what has sometimes been referred to as a requisitioning letter was sent, following up the telegram? A. That is so; it should go in all cases. The fact that it did not in this case, so far as I can find—I cannot find a copy of such a letter—is simply a breakdown in official routine. The telegram was sent, which was the executive side of it.

Q. Which in your view is the operative instruction? A. The order itself, however it is communicated. The order was conveyed in the telegram.

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Q. Suppose Messrs. Hogarth had refused to conform to the requisition communicated in the telegram, can you tell us what the result of that refusal would have been? A. As far as I am concerned, I should have taken the ship; whether any pains and penalties would have followed to Messrs. Hogarth I never enquired; I should have taken the ship.

Q. I do not know whether any representation in fact was made to you by either the owners or Messrs. Harley & Company, their agents, after you

had requisitioned her in the way you have stated, to have her released?

(Question objected to.)

A. That is very difficult to say. I had constant interviews with Messrs. Hogarth and Messrs. Harley in which they pressed for the release of steamers. It was at that time a constant plea from all ship owners, and Messrs. Hogarth were not less persistent than others.

Q. Having regard to the nature of the employment which if the vessel had not been requisitioned she was about to take up, that is to say the carrying of oil from Texas to Cape ports, would a request by the owners or Messrs. Harley & Co. for her release have resulted in her being released? A. Certainly not. 248

Q. Was the carriage of a cargo of oil from Texas to Great Britain regarded by the Transport Department as being in the interests of the British Empire at war? A. I can hardly answer that. What happened was that it was not considered anything like so requisite as the carriage of mules from the United States to this country for the purposes of war. The carriage of oil to the Cape was of importance, but it was not comparable with the carriage of mules to this country, that is to say, military importance. 249

Q. Was it for the carriage of mules to this country that the *Baron Ogilvy* was in fact employed? A. That is so.

Q. I think she made four voyages altogether, did she not, with mules? A. I have not a record; I can give you that if you wish it; I know she made a number of voyages.

Q. In regard to the terms of her employment, I think it was arranged, was it not, by a letter from

your department to the Transport Department of the 15th April, 1915, addressed to the owners' agents, Messrs. Harley & Co., and signed by you, that the basis of remuneration should be a rate per head of mules? A. That is so.

Q. Was that arrangement agreed to at the request of the owners? A. It came at the suggestion of Messrs. Harley, presumably acting with the owners.

Q. Being an alternative to simply the ordinary remuneration at Blue Book rates? A. That is so.

251 Q. Did it happen to suit the government that a rate per head should be paid? A. Oh, yes, we should not have paid it otherwise.

Q. Would that relieve the government of the trouble of making certain disbursements? A. It relieved the government of the trouble of putting up the proper fittings, providing forage, and providing attendants and carrying out a large amount of detail work which it was difficult to do at that time, and it was avoided by paying the rate per head.

Q. The putting up of the fittings and the other matters would be paid for by the owners out of the rate per head? A. Yes.

252 Q. Whether or not it was better for the owners from the point of view of payment you are hardly in a position to say? A. I would not have made the offer unless I made it clear to my mind that we were not paying more than the alternative arrangement would have cost us under the Blue Book rate of hire plus the cost to the government of supplying fittings. The owner was in a position to make such arrangements and had resources, and I had not. I should have had to carry it out *ad hoc*.

Q. I do not know whether you have the date, but I think I am right in saying that the vessel continued to be employed till the 20th October, 1915, when she was released from government service?

A. Yes.

Cross-examination by Mr. Le Quesne.

Q. For what were these mules required? A. For the army.

Q. Did you receive instructions from some military authority to that effect? A. We received requests; a requisition from the military for the conveyance of certain numbers of animals.

554

Q. So that you do not speak of your own knowledge when you say that these mules were required for military purposes; you merely pass on to us information which was given to you by some military authority? A. Quite.

Q. Can you tell us where the animals for use in this country or elsewhere? A. Elsewhere.

Q. And to what port were they actually carried by this ship? A. In this country—do you mean their ultimate destination?

Q. At what port were they discharged by the vessel? A. I am afraid I do not know; it would vary between Avonmouth, Liverpool, and so forth.

Q. It would be England? A. A port in the United Kingdom. 255

Q. Are you familiar with the terms of the Proclamation of the 3rd August, 1914? A. Yes.

Q. In the beginning of that Proclamation it is stated: "Whereas a national emergency exists rendering it necessary to take steps for preserving and defending national interests; and whereas the measures approved to be taken require the immediate employment of a large number of vessels"—for certain

your department to the Transport Department of the 15th April, 1915, addressed to the owners' agents, Messrs. Harley & Co., and signed by you, that the basis of remuneration should be a rate per head of mules? A. That is so.

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Q. In the beginning of that Proclamation it is stated: "Whereas a national emergency exists rendering it necessary to take steps for preserving and defending national interests; and whereas the measures approved to be taken require the immediate employment of a large number of vessels"—for certain

purposes—"but owing to the urgency of the need it is impossible to delay the employment of such vessels until the terms of engagement have been mutually agreed upon." Do you remember that introductory paragraph? A. Oh, yes.

Q. Do you remember that the Proclamation goes on to say: "Now, therefore, we authorize and empower the Lords Commissioners of the Admiralty by warrant under the hand of their Secretary or under the hand of any Flag Officer of Our Royal Navy holding any appointment under the Admiralty to requisition and take up for Our service any British ship" and so on? A. Yes.

Q. Now, first of all, was this vessel requisitioned by any warrant under the hand of the Secretary of the Admiralty or of any flag officer? A. Do you mean is the actual warrant in existence, naming the *Baron Ogilvy*, signed by the Secretary of the Admiralty or a flag officer?

Q. Yes. A. Not to my knowledge.

Q. Is there any document in existence here to your knowledge requisitioning this vessel, if she was requisitioned, apart from the document to which you referred in your examination-in-chief? A. No.

Q. Therefore, if a requisition is only valid when made by a warrant, this vessel was never validly requisitioned? A. The "if" leaves nothing to answer. There is nothing I can answer then.

Q. You do not feel able to answer that question? A. My answer would be not as a lawyer, but as an ordinary person, that that Proclamation is a Proclamation of the Crown's intention to do certain things, but that the Proclamation does not confer upon the Crown power to do those things; the power that the Crown had to take necessary steps for the defence of the realm is a preroga-

tive right of the Crown, and that right is exercised in any manner the Crown chooses; this Proclamation advises the community that the Crown is going to do this. It is no use noting this because I am no lawyer; I am merely giving my opinion. It merely advises the shipowners that the Crown is going to take these ships, and puts in the last portion of it a consolatory paragraph for the shipowner, to the effect that the Crown intends to pay for doing it, or to pay compensation for doing it.

Q. In requisitioning this vessel, you were acting, were you not, on behalf of the Lords Commissioners of the Admiralty? A. Undoubtedly.

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Q. Are there not a large number of vessels engaged at present on public service under the directions of your department which have not been requisitioned, but have been chartered to you by their owners? A. Of British ships, ships under the British flag to which the rights of requisition apply in the sense contemplated in that Proclamation; very very few. There are some in which we have made charter-party agreements, but I think in the majority of those cases the agreement has been made with the requisition in the background, and in negotiating the terms have been fixed relatively to the power in us to requisition and the right of compensation is fixed by the Blue Book, although we may then have framed a charter-party to meet mutual needs.

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Q. In other words, in fixing those charter-parties both parties understood that you, one of the contracting parties, hold the big stick? A. That is so; in some cases we wanted more than the mere ship and so on.

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Q. Is not that exactly what happened in this case? A. No; in this case the ship was actually requisitioned; there was no charter-party made.

Q. Did you not receive a letter from Messrs. Harley & Co. dated the 9th April, 1915, and beginning "With reference to your verbal notice of requisitioning"? A. Yes.

Q. Did you also receive a letter of the 10th April from Messrs. Harley & Co. beginning "We beg to acknowledge receipt of your notice of requisition"? A. Yes.

263 Q. Would you be good enough to look at the opening words of both letters. The opening words of the former letter are: "With reference to your verbal notice of requisitioning this steamer we beg to say that if it would suit your purpose equally well to charter her for four trips from New Orleans to Avonmouth or Liverpool for the conveyance of mules, that owners would be agreeable," and so on, and the opening words of the later letter are: "Permit us to say that if it would suit your purpose equally as well to charter her for four trips from New Orleans to Avonmouth or Liverpool for the conveyance of mules that owners would be agreeable," and so on. Did you in reply to that letter send a telegram to Messrs. Harley, dated the 10th April, 1915, to this effect: "Your offer *Baron Ogilvy* four voyages conveyances from New Orleans to Avonmouth or Liverpool freight thirteen pounds ten shillings per head gratuity ten shillings each animal landed alive is accepted"? A. Quite.

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Q. Did you afterwards, on the 15th April, write to Messrs. Harley the letter to which I have already referred? A. Yes.

Q. The opening words of that are: "With reference to your letter of the 10th instant, and in

confirmation of my telegram of the same date, I beg to inform you that your tender of the S. S. *Baron Ogilvy* is accepted"? A. Quite.

Q. Do you still say, in the light of the language used in those three letters, and in that telegram that this vessel was not chartered to you by her owners? A. Surely the question is, what exactly you mean by chartered? If you mean I made an agreement with the owners after the requisition, certainly, but if you mean the owners chartered to me freely in the market sense of the term chartered, but that they had a free boat that they offered at the market rate, and I took it, no, nothing of the sort.

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Q. Is not that what happened, that you sent to the owners the telegram of the 10th April, and the owners under the pressure of that telegram offered to charter the vessel to you, and you accepted the offer? A. It is rather difficult to answer the question, you put it rather curiously, if I may say so; I requisitioned the ship and afterwards the owners and myself agreed to a certain basis of payment; that is really the way it is in my mind.

Q. That is your view of the transaction? A. That is my view of the transaction.

Q. You would not say that the language employed in the letters was inaccurate? A. No, because after the requisitioning telegram went a certain offer was made to us, and we accepted it, but all this is the sequence of the requisitioning of the ship.

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Q. Is not this just one of these instances in which the shipowner has bargained with you on the basis that you had the big stick? A. No, the point is the shipowner has his ship taken from him; then all he can do as a prudent shipowner is to make the best he can of it with us. I had something I

wanted from him outside the ordinary requisition and it suited him to take that line.

Q. The result of the arrangement was that you obtained something from him you would not have obtained if the vessel had been requisitioned in the ordinary way? A. Quite, that is so.

Q. Your letter of the 15th April, in clause number 2, says: "Conditions to be as at present operative in the case of other vessels belonging to Messrs. Hogarth & Sons." That is in respect of the *Baron Ogilvy*? A. That is so.

Q. Can you tell me whether the conditions governing the use of their other vessels were set out in writing? A. Oh, yes.

Q. You, I presume, have not any documents with you? A. Not with me, but I could send them.

Q. I presume they would be in the possession of Messrs. Hogarth? A. Certainly, or their agents.

Q. You remember, do you not, that the preamble of the Proclamation states that the requisitioning to which the Proclamation relates is to take place because the need of employment of vessels is so urgent that there is no time for a mutual agreement of the terms of engagement? A. Quite.

Q. Was not this a case in which it was happily possible for the parties to mutually agree upon the terms of engagement? A. No, not from my point of view, the reason being that we were dealing with a very large number of ships and you probably know that negotiations to arrive at a rate to be agreed between two people are a lengthy and troublesome process; there was no possibility of doing it.

Q. You had already, in the case of other ships belonging to this same line, arrived at certain conditions upon which they were being worked? A. Quite.

Q. And in respect of this ship you were able to agree that the same conditions should apply?

A. Quite.

Q. It was not, therefore, either difficult or a lengthy business to come to a mutual agreement as to the terms of engagement with regard to this particular vessel? A. It was not a difficult or lengthy business when I had requisitioned her, but to conclude a bargain with them on the basis of a free ship would have been a difficult and lengthy business. I could not have done it; the ship had a charter she could not break. It was impossible for myself and the owners to come to an agreement for the use of that ship. I had to take the ship by the exercise of the Crown's powers. Quite obviously there was no question of discussing terms with the owner; he had a prior engagement for the ship.

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Q. Had you not, as a matter of fact, given some intimation to Messrs. Harley before the 10th April that you would probably be requiring this vessel?

A. Yes, I think we had.

Q. Before the 9th April? A. I think so; our need was very well known; our whole purpose of getting the particulars of those ships was that we should be up to date in their position and so forth.

Q. Had you not made it plain to them that if this vessel was not chartered to you on the terms on which you were already employing the other vessels of this line, you would have to requisition her?

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A. Certainly not. May I point out again there is no question of charter; the owners could not charter the ship to us. They had a charter for the ship.

Q. I think you told us that in most cases a requisitioning letter is sent, and, according to the rules

in your department, such a letter would be sent in all cases? A. Certainly.

Q. You expressed the view, did you not, that the telegram in itself was sufficient? A. Yes, but I plead guilty to the fault of office organization which did not permit the letter to go. You must remember the pressure and the number of ships dealt with.

Q. On what do you base your statement that the telegram alone is sufficient? A. Simply this that the ship is taken by order of the Crown, however the order is conveyed; the order is operative when it is received. That telegram conveys the Crown's order and that order must be obeyed.

Q. You would not contend, would you, that the whole of the prerogative of the Crown is vested in every one of the servants of the Crown? A. I do not think I can follow you into that sort of thing. Quite obviously, the Crown works through certain channels, and a servant who occupies a particular post to carry out particular duties for that purpose carries the prerogative of the Crown; but obviously, if I commandeered a horse for land transport, I should be shot at; it is not my business. If I, for the Director of Transports, commandeer a ship, that is my business, and the channel I am in is the one through which the Crown's prerogative works.

Q. You would agree your power to requisition vessels is the power conferred upon you by this Proclamation? A. With respect, no. I think the power is the power of the Crown which lies behind the Proclamation. I always read that Proclamation myself as merely declaratory, an advertisement to the shipowners first that we are going to take ships, and, secondly, which they needed to assure them, that we were going to pay for them, and that the compensation, which was an impor-

tant point to them, was to be fixed by a panel including shipowners. You see, it was a new thing that we were dealing with, the taking of a large number of ships, very urgently needed for civil and military service. We had to give some idea of how we were going to do it, and how we were going to pay.

Q. Going back to the list of vessels that are chartered to you, could you give me any idea of the number of vessels beyond that list? A. No, I could not; it is a very small number compared with the total ships for service.

Re-examination by Mr. Raeburn.

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Q. You have been asked whether any warrant was issued under the hand of the Secretary of the Admiralty or any flag officer requisitioning the *Baron Ogilvy*; I think you said no. Do you know whether that method of requisition has ever been adopted in this war? A. Flag officers have requisitioned on stations abroad in certain cases.

Q. When you are requisitioning through your department, that is to say, in London here, what is done? A. The letter which follows the telegram usually is a Secretary of the Admiralty letter; a block signature letter.

Q. A printed signature? A. That is so. There is no formal warrant or anything of the sort.

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Q. Just to get the sequence of events, about this 9th and 10th April, it would rather appear—tell me if I am right—that on or before the 9th April you had verbally requisitioned the *Baron Ogilvy*. Would you look at the first letter to which my friend referred? A. "With reference to your verbal notice of requisitioning this steamer." We told Messrs. Harley obviously that we were going to take

that steamer. The actual telegram sent on the 10th I think was at 8.18 A. M., very early, so the decision was come to on the 9th. As Harley was in constant attendance at our office, he would have been told on the 9th.

Q. Then there was an arrangement made as to the terms upon which the vessel should run for the government? A. Quite.

Q. It is referred to there as chartering her? A. Yes.

Q. You were one of the parties to that arrangement? A. Yes, I was.

Q. Was that, in your view, a voluntary charter of the vessel by the owners to the Director of Transports? A. Not voluntary in any sense except this, that he was not bound after the ship was requisitioned to accept these conditions as to giving us fittings and attendants, and forage and so forth.

Q. In other words, you had a right, as you told us, by the prerogative of the Crown to requisition a ship? A. Which I exercised.

Q. But had you any right to require the owner to alter her or put up fittings? A. I had no right to do that.

Q. As I understand, for the carriage of the mules, that would have to be done by the Admiralty? A. That would have to be done by the Admiralty.

Q. And it suited you to have that done by the owners instead? A. It suited me to pay Hogarths, as my agents, to do it.

Q. Supposing you had not come to an arrangement as to the terms on which this vessel was to run on these mule trips, what could have happened; would Hogarth have had his vessel free? A. No, I should have taken the ship, had her fitted myself, and he would have been paid the Blue Book rate of hire and nothing more, in addition to which

there might have been his liability for punishment.

Q. I dare say they have heard in the States, as we have here, of what we call in this country Hobson's choice? A. Yes.

Q. Would it be right or wrong to suggest that with regard to this ship, so far as Messrs. Hogarths were concerned, it was rather a case of Hobson's choice? A. It was entirely a case of Hobson's choice.

Further cross-examination by Mr. Le Quesne.

Q. There are two other things I should like to ask. Do not Messrs. Harley act as agents for you in looking out for vessels? A. In no sense; they are brokers. 284

Q. Do they not, in their capacity as brokers, act on behalf of the Admiralty in obtaining information as to vessels that will be suitable for various purposes for which the Admiralty may require them? A. No, I think for purposes of their own profit they come to the Admiralty; the Admiralty does not commission them as agents to ascertain and report; the Admiralty, where it has agents, has a definite appointment for them.

Q. It is true, is it not, that owners in some cases have contended that the Admiralty have no right to requisition these vessels for the particular purposes for which they were being requisitioned? A. I do not think any owner, so far as I know, has questioned that the Admiralty has no right to requisition his vessels; you may be referring to the Holt case. 285

Q. No, I am not. A. I think the owners have contended that the Admiralty have no right to requisition more than the bottom, the ship as it stands, that we have no right to force the owners to run

286 *Deposition of Julian Foley—Recross—Redirect.*

the ship for us. Whether that is so or not, I do not know, but most owners, practically all owners, take the sensible line that having the ship requisitioned they might as well carry on sensibly.

Q. Are you not aware that in the case of the *Crown Steamship Company v. The Lords Commissioners of the Admiralty*, the case of the *Crown of Leon*, the owners contended and are still contending, in a case which is before the Courts, that the power to requisition does not extend to the use made of their vessel on a certain voyage? A. Do you say that claim was made?

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Q. Yes. A. They wished that the ship should not be requisitioned—

Q. Would you answer my question? A. I am not familiar with the *Crown of Leon* case, but I see the point of the objection to the particular use of a ship apart from the power of requisitioning the ship.

Further re-examination by Mr. Racburn.

Q. As you were asked about Harley & Co. and whether they were your agents, I suppose one may take it, agents are usually paid by their principals on some terms or other? A. We have found it so.

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Q. Were Messrs. Harley paid agency by you? A. Certainly not.

Q. Or brokerage? A. Certainly not.

Q. Or commission? A. Certainly not.

Q. Did you pay brokerage, or agency, or commission, or whatever you may choose to call it, in connection with the taking of the *Baron Ogilvy*? A. Certainly not.

Mr. Le Quesne: I wish to call attention to the fact that some letters have been pro-

duced to us since the occasion upon which I cross-examined Mr. Hogarth. There are matters in those letters upon which I should have cross-examined him if the letters had been before me; and further in the letter dated the 15th April, 1915, one of the letters to which I have just alluded as having been produced since I cross-examined Mr. Hogarth, from Mr. Foley to Messrs. Harley, allusion is made to conditions operative in the case of other vessels belonging to Messrs. Hogarth, and I call for the production of the documents in the possession of Messrs. Hogarth, in which those conditions are laid down.

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(Counsel and solicitors agreed to waive the reading over to, and the signature of, this evidence by the witness.)

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IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK.

<p style="text-align: center;">THE TEXAS COMPANY, Libelant,</p> <p style="text-align: center;">v.</p> <p>HOGARTH SHIPPING COMPANY, LIMITED, as owners of the Steamship <i>Baron Ogilvy</i>, and HUGH HOGARTH & SONS, Respondents.</p>	}	In Admiralty.
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Depositions of witnesses taken at London, Eng.,
on Commission, on the 27th February, 1918.

CHARLES ROBERTSON DUNLOP, sworn as a witness
on behalf of the respondents, testified as follows:

Cross-examination by Mr. Le Quesne.

Q. I know that you are familiar with the exact words of the Proclamation of the 3rd August, 1914, but would you be good enough to have them before you for the purpose of the first few questions I am going to ask? You will observe this is a Proclamation headed: "A Proclamation for Authorising the Lords Commissioners of the Admiralty to requisition," and in the Proclamation itself you find the words "We authorise and empower the Lords Commissioners of the Admiralty by warrant

under the hand of their Secretary or under the hand of any Flag Officer of Our Royal Navy holding any appointment under the Admiralty to requisition." Do I understand that in your opinion it was competent for the Admiralty to requisition this vessel otherwise than by a warrant such as is described in the terms of the Proclamation? A. Yes.

Q. Do you say that the Lords Commissioners of the Admiralty had authority to requisition in any way which might seem good to them? A. Yes, any British ships whose owners are within the jurisdiction.

Q. For what purpose then, in your opinion, were the words to which I have called your attention inserted in this Proclamation? 296

Mr. Raeburn: I take formal objection to that question.

A. I am afraid I cannot answer because I was not in any way a party to the drafting of this Proclamation.

By Mr. Le Quesne.

Q. What meaning do you attach to them, if as I understand, in your opinion, they do not in any way limit the right of the Lords Commissioners to requisition? A. The Proclamation as I have endeavored to explain in my opinion, did not in any way create, limit, or extend the right of the Crown to requisition British ships; the Proclamation was issued for the convenience and instruction of the public to make known the fact that an emergency had arisen, and that the Lords Commissioners would requisition ships within the British Isles or the waters adjacent thereto; but I do not think that this Proclamation was intended to limit, or indeed 297

could limit, the prerogative right of the Crown to requisition British ships wherever they might be situated, if the Crown thought it necessary for the defense of the realm that they should be requisitioned. I do remember that after the date of this Proclamation a question arose as to whether there should be a fresh Proclamation extending this Proclamation to British ships anywhere. It was not considered necessary, although later on I believe there was a Proclamation which further stated the circumstances under which the Admiralty would requisition ships. This Proclamation, in my opinion, is merely a public notice that has no statutory effect; it has really no legal effect; the Crown, through the Admiralty could have requisitioned ships without issuing any Proclamation at all.

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Q. I understand, then, in your opinion, the Proclamation cannot limit the prerogative power of the Crown to requisition ships? A. That is my opinion.

Q. But may not the Proclamation limit the method in which specified officials of the Crown are entitled to exercise that part of the Royal prerogative? A. No.

Q. What authority have you for saying that a Proclamation cannot have that effect? A. I know of no authority to the contrary.

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Q. Are you aware of any authority in support of your proposition? A. I do not think any case that I have found has arisen in which the point has been considered. I can hardly conceive circumstances in which it would arise.

Q. You have been shown, I believe, the telegram by which this vessel is said to have been requisitioned? A. Yes, I have.

Q. And I take it that you will agree that that was not a requisition within the language of this

Proclamation? A. No, I do not think it was, although I am not quite sure what a warrant in the Proclamation is; I do not know of any particular form that a warrant must take.

Q. Assuming for the moment that the telegram is not a warrant, I understand that in your opinion it was none the less a good requisition? A. Yes.

Q. Would you be good enough to turn to page 389 of this Manual, on which are printed the rules to be followed in respect of arbitrations which are held in connection with ships that have been requisitioned? A. Yes.

Q. You will notice that in the fourth of these rules it is provided, "If the Admiralty and the Claimant fail to arrive at an agreement within a reasonable time, to be determined in each case by the President of the Board of Arbitration, the Admiralty shall report the matter with the necessary papers to the President." A. Yes. 302

Q. In your opinion, would the Lords Commissioners of the Admiralty be compellable, or would they not, to report a matter to the President, if there had been a failure to agree, and they had failed to report the matter? A. If there had been a dispute between the owners and the Admiralty as to the terms on which the vessel was to be requisitioned, that dispute would under the rules have been referred to the Board of Arbitration referred to in these rules. 303

Q. Supposing the Admiralty, for some reason or other, declined to report the matter to the president or to refer it to him, could they not be compelled to do so? A. I do not know; I do not think that difficulty has ever arisen.

Q. You do not feel able to say whether they could or could not be compelled to act in accordance with that rule? A. My own view is that if the

Admiralty failed to report the matter to the president of the Board of Arbitration, the claimant would be quite free to do so, and that thereupon the president of the Board of Arbitration would communicate with the Admiralty and ask them what they proposed to do, and thus matters would be very quickly brought to a head.

Q. If they declined to report the matter to him, or to deal with it before him, would he not be entitled to deal with it on the footing that they were in default? A. That I do not know; that has never arisen.

Q. Are you aware of any recent decision of the English courts to the effect that a requisition made by a telegram and purporting to be made under this Proclamation is a good requisition? A. Yes, *The Sarpen*.

Q. Was the validity of the requisition at all questioned in *The Sarpen*? A. No, it could not be questioned; if it could have been questioned, I think it clearly would have been.

Q. However that may be, the Court was not called upon to decide between the parties whether the requisition was valid or not? A. No, that is true. Nobody has ever dreamed of taking the point in any case that has come before the English courts.

Q. You are familiar with the later Proclamation relating to the requisitioning of ships, which is dated the 10th November, 1915? A. That was the one I had in my mind, although I had forgotten the date when I was referring to the Proclamation of the 3rd August, a little while ago.

Q. I am correct, am I not, in saying that under that Proclamation the requisition must be signed by some person authorized for the purpose either generally or specially by the president of the Board of Trade? A. I have not got the language of the

Proclamation in my mind, but if that is stated in the Proclamation, I dare say your extract from it is perfectly right, the Proclamation would speak for itself.

Q. Would not the effect of requiring by Proclamation that a requisition should be made in a particular form or by particular persons, be to give some protection to His Majesty's subjects whose ships are to be requisitioned? A. I do not quite understand what you mean.

Q. Would they not have the protection of the authority of the official who is authorized to make the requisition, or to sign the form? A. I think that if any owner of a British ship who received a telegram such as was sent in this case, was in doubt as to whether the telegram was genuine, or was in doubt whether the sender of the telegram was an authorized person, he might insist upon being served with formal documents, and if he wished to be so served, I have no doubt the Admiralty would have served him; but, as everyone knows, these telegrams such as were sent in this case are sent by responsible officials, and every owner of good sense knows that it is quite unnecessary to trouble the Admiralty to follow up that telegram with the issue of formal documents.

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Q. Reverting for a moment to the actual words of the Proclamation of the 3rd August, 1914, the words are "by warrant under the hand of their secretary or under the hand of any flag officer of our Royal Navy"? A. Yes.

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Q. Is it your opinion that the requisition can be validly made by any official in the Admiralty? A. Any official who for the time being is entrusted by the Admiralty with the function of requisitioning ships.

Q. Are the Admiralty, therefore, in your opinion, entitled to entrust someone with that function who is neither their secretary nor a flag officer in the navy? A. Yes, in my opinion, that is so.

Q. In your view, therefore, is it not true to say that the particular words to which I have just referred, "by warrant under the hand of their secretary or under the hand of any flag officer of our Royal Navy," have no effect whatsoever? A. Oh, yes, they have, they empower the Admiralty by means of a warrant under the hand of the secretary or under the hand of a flag officer to requisition, but that does not exclude the power of the Crown through the Admiralty to requisition in any other way that effectively brings to the notice of the British ship owner here that his ship is wanted for national purposes.

Q. Your view is, therefore, that the power of the Lords Commissioners of the Admiralty to requisition vessels was just as great after the issue of this Proclamation as if the Proclamation had not contained the words "by warrant under the hand of their secretary or under the hand of any flag officer of our Royal Navy holding any appointment under the Admiralty"? A. Yes, I do, and, moreover, I say that a British ship owner acting on the faith of a telegram received as in this case dispenses with the issue of a warrant under the hand of the secretary or under the hand of a flag officer; I dare say if he had insisted upon one he could have got one, if he had wanted a formal warrant, but in my experience no British ship owner during this war has asked the Admiralty to issue a formal warrant after the ship owner has received the telegram which is perfectly well understood by every British ship owner.

Q. Does he not so dispense at his own peril, or is it your view that the Lords Commissioners would be as much bound by the telegram on which he acts as if they had requisitioned the vessel by a warrant under the hand of their secretary? A. Yes, that is my view; he bows and submits himself to over-riding necessity and power; whether he bows to the telegram or rebels on receiving the telegram and demands a warrant, I think makes no difference; just as if a policeman had power to arrest you, and you allowed him to arrest you without the issue of a special warrant for the purpose; if you objected to the original arrest the policeman would no doubt in some cases have to produce his warrant; the arrest by the policeman would be none the less in the exercise of executive power whether the power was exercised with or without a warrant.

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Q. I do not wish to pursue the analogy too far, but are there not cases in which an arrest by a policeman without a warrant is not legal? A. That is so.

Q. In this case then, as I understand in your view, although this Proclamation has prescribed the mode in which the Royal prerogative to requisition should be exercised by the Lords Commissioners, the Lords Commissioners are none the less completely at liberty to requisition in any mode that they may choose? A. That is so; that is to say that if the ship owner yields to the first intimation given to him by means of a telegram he dispenses with the use, and both parties dispense with the use of the formal document referred to in the Proclamation, and, I venture to think, dispense with that for very good public reasons, and that is the explanation why throughout this war vessels have been requisitioned by letters and by telegrams, and not by the

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use of formal warrants of the kind referred to in the Proclamation.

Q. Do you say that, assuming a failure to obey a requisition is attended by certain pains and penalties, that those pains and penalties would be attached to a failure to obey the directions contained in the telegram that was forwarded in this case to the ship owners? A. Certainly; if the ship owner on receipt of the telegram assented to it as being a requisitioning.

Q. Would you mind assuming for the moment that he did not so assent, but declined to regard it as a valid requisition? A. Then, if that contingency, which I believe has not arisen, had arisen during this war, the Admiralty would no doubt have served the rebellious ship owner with a formal warrant.

Q. Would they not have been obliged in law to serve him with the warrant before they could make him amenable to the pains and penalties which attached to a failure to obey a requisition? A. That I cannot answer, because, as I say, this question has never arisen, and I do not know what might have happened if the question had arisen.

Q. As regards the right of the Crown to requisition these vessels, and apart from the form of the requisition, can you point to any case in which the right to requisition vessels has been questioned and upheld? A. In the case of *Heilgers & Co. v. The Cambrian Steam Navigation Company, Limited*, 33 Law Times Reports, page 438. In that case the vessel was requisitioned in India, and the question which the charterers were raising was whether the requisitioning had put an end to the charter. The attention of the Court in that case was drawn to the fact that the August 3rd Proclamation refers to ships in British waters, or in waters adjacent thereto, whereas in Heilgers' case the ship, as I

have said, was requisitioned in Indian waters, and it was suggested faintly, and almost immediately withdrawn, that the Crown had no power to requisition this ship in Indian waters, and were therefore more likely to release her within a short time as the charterers were contending; that is how the point arose in that case, but, as I say, the point was suggested, there was nothing in the point, and the learned Judge in his judgment does not take any notice of it.

Q. You are, therefore, as I understand, not aware of any case in which the right of the Crown to requisition a British vessel either in British or foreign waters, has been questioned, and resolutely questioned and upheld by the Court? A. Nobody has had the courage in an English court, and when I say courage, I mean courage and discretion to raise the point; if that was the best point they had, then there was not very much in their case. Might I say in connection with that, in *The Broadmayne*, 1916 Probate, page 64, if my recollection is right, the power of the Crown to requisition is dealt with by Lord Justice Swinfen Eady and Lord Justice Pickford, the power of the Crown to requisition British ships was clearly affirmed, although I agree with you that the power of the Crown to requisition was not disputed in that case. This is the passage that I have in mind, which is at page 67 of 1916 Probate, where Lord Justice Swinfen Eady says: "It is not disputed—indeed, it is beyond dispute—that it is part of the prerogative of the Crown in times of emergency to requisition British ships." He goes on to support that view by reading a passage from the authoritative work on the prerogative, Chitty's Prerogative of the Crown. I do not think you could want a clearer judicial statement affirm-

ing the power of the Crown than is contained in the passage that I have quoted.

Q. I think I understood you to say that you are not aware of a case in which that right to requisition has been resolutely questioned and upheld? A. No.

Q. You are familiar, I am sure, with the decision of Mr. Justice Bailhache in the recent case of the *China Mutual Steam Navigation Company, Limited*, v. *Sir Joseph Maclay*, which is reported in the 34th Times Law Reports at page 83? A. Yes.

Q. I think it only fair to ask you if you desire to make any comment upon a paragraph which occurs at page 83 of that report, and which is as follows: "Evidence was given by Mr. Slade, a Barrister at Law, that he had searched the records of the Admiralty at the Record Office, and had found no trace of ships being taken by compulsory powers during the American war of Independence from 1775 to 1882, the War with France from 1793 to 1795, and from 1800 to 1804, and during the War with America in 1812"? A. I may say personally I have made no such search.

Q. Personally you would feel able to agree with me that the periods within which those years fall, say the period from 1750 to 1850, was a sufficiently bellicose period in the history of this country? A. But evidently not giving rise to the conditions which this war has created, which has required the British Government and, indeed, the governments of all our allies, to requisition their own merchant ships for the purpose of carrying on the war and feeding their populations.

Q. You referred just now to an observation of Lord Justice Swinfen Eady in delivering his judgment in the case of *The Broadmayne*? A. Yes.

Q. I have no doubt you are familiar with the observations which he made in dismissing the appeal of the Crown in the *Crown Steamship Company v. The Lords Commissioners of the Admiralty*, which is reported at page 5 of Lloyd's List for the 8th December, 1917? A. I have not got in my mind the case to which you are referring.

Q. I am anxious to have this included in the record; perhaps you will be good enough to look at the passage now and see if you wish to make any comment upon it?

(Document produced and marked "C. R. D. 5.")

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A. Yes, I remember this case, but with the greatest respect, I do not know what bearing it has upon the interesting topics we are discussing in this case.

Q. That is a case, is it not, in which Lord Justice Swinfen Eady did distinctly recognize that there are definite limits to the Crown's rights to requisition? A. I do not so read any extract that you have in the paper you handed to me.

Q. That is the only extract I propose to attach to the record. A. The extract will speak for itself. The question as far as I can understand in that case is whether the Court had power under the Arbitration Act to order the Admiralty Transport Arbitration Board to state a case for the opinion of the Court on a question of law. The right of the Crown to requisition does not appear to have been raised by the ship owner, or the very learned counsel whom I see was representing the ship owner.

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Q. May I give a further reference to the decision in that case before the Divisional Court in 33 Times Law Reports, page 472, in which the point was decided by the Divisional Court, which was afterwards taken on appeal by the Crown to the Court

of Appeal? I only give the reference for the purpose of exactness. I have nothing to submit to you upon it. I understood from your evidence that was given last time that in your view the effect of this requisition was to discharge the contract? A. Yes.

Q. I see in your statement of the law which has been handed to me you refer to a case of *Shipton Anderson & Company v. Harrison Brothers & Company*, 1915, 3 King's Bench, page 676, and you say "the principle deduced by Lord Reading from the authorities in that case was that a party to a contract is excused from performance or from any liability to pay damages for non-performance if the act to be performed is rendered unlawful or impossible of performance by a lawful act of State subsequent to the making of the contract"? A. Yes.

Q. Now, I presume that you will agree that that decision is no authority for the statement that this contract is discharged if the act which is supposed to have operated as a discharge, namely, the requisition, was unlawful, either by reason of the form in which it was made, or otherwise? A. No, the case is not dealing with an impossibility of performance created by an unlawful act of State, but I venture to think that the principle would be precisely the same if the act of State had been technically unlawful.

Q. If the act of State were unlawful there would be no duty imposed upon any subject to obey the act of State, would there? A. There would be no duty in the sense that if he could obtain from a law court a decision that the act of State in question was unlawful, he would not be bound by it, but I anticipate that a ship owner receiving notice of requisition, as in this case, could hardly be called

upon to resist the notice until he had obtained a decision of a law court upon its validity.

Q. If the notice is unlawful, and the subject upon whom it is served and to whom it is issued, declines to obey, then he does not expose himself in law to any pains and penalties, does he, for failing to obey it? A. No, he would not be fined or sent to prison, but I think any British ship owner who was foolish enough to question the legality of a notice of requisition such as was received in this case, would be exposing himself to a very serious risk which no reasonable man would, in my view, say he ought to expose himself to, of resisting and testing by inviting prosecution.

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Q. Is it your view, then, that the requisition in this case operated as a discharge of this charter-party, even though the requisition was unlawful?

A. If it was obviously unlawful, and the view of the Court was that the ship owner had acted unreasonably in obeying it, I do not think that the requisitioning, if unlawful, would excuse him, but if the conclusion of fact was that the ship owner by obeying it had acted reasonably, then I think the principle of *Shipton Anderson & Co. v. Harrison Brothers & Co.* would apply; in other words, a British ship owner receiving a notice of requisition in a form in which hundreds of notices had been issued and obeyed would, in my opinion, be acting unreasonably if he ventured to dispute it, but if he did venture to dispute it, any technical flaw in the notice would be speedily remedied by the Admiralty.

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Q. Is it your view that the requisition operated as a discharge of the contract, if it was unlawful, though not obviously unlawful? A. Yes.

Q. Can you give me any authority in English law for that proposition? A. The law as a rule does not require a man to act unreasonably, and pro-

teets him if he acts reasonably; if he receives a notice which in the mind of any reasonable man would operate as a mandate to him not to perform his contract, then, in my view, he would be effectively prevented from carrying out the contract by yielding to that mandate.

Q. You are familiar with the provisions of Section 3 of the Courts (Emergency Powers) Act, 1917? A. Yes.

Q. It is provided by that, "Where before or after the passing of this Act the non-fulfilment of any contract (not being a contract of tenancy) was or is due to the compliance on the part of any person with any requirement, regulation, order or restriction of any Government Department, or of a competent naval or military authority, made, issued, given or imposed for purposes connected with the present war, or with any direction or advice issued or given by any Government Department with the object of preventing transactions which in the opinion of the department would or might be contrary to national interests in connection with the present war, proof of that fact shall be a good defence to any action or proceeding in respect of the non-fulfilment of the contract." I understand from your answers to the questions I have just been putting to you that you regard Section 3 of that act as merely declaratory of the common law?

A. I think so; I think it is stating the effect of an order such as was referred to in the section, very much in the language or on the principles elaborated by Lord Reading in the case of *Shipton Anderson & Co. v. Harrison Brothers & Co.*

Q. Is it your view, then, that this section will only operate in the case of a compliance with a requirement, regulation, order or restriction which is a lawful requirement, regulation, order or restric-

tion? A. Yes, I think the section is limited to the particular kind of order that is referred to in the section.

Q. In your judgment it is limited to a lawful order? A. Well, I am not quite sure; I have not considered that with sufficient care to enable my answer really to be of any value.

Q. Assuming, if you would be good enough to assume, that this requisition was not issued by the proper authority, because it was not issued by the secretary of the Admiralty or a flag officer, would this section apply? A. That I would not like to answer.

Q. Would not its application be excluded, seeing that it contains the words "requirement, regulation, order or restriction of any Government Department or of a competent naval or military authority"? A. The competency of the authority is a question which may be quite distinct from the legality of the order made.

Q. Can an authority be competent to make an order which is not within its powers or jurisdiction? A. No, because *ex hypothesi*, if you assume it has not got the power, the answer is no, it has not got the power.

Q. There have been cases, have there not, in which English courts have held within the last two or three years that a requisition did not operate as a determination of a charter-party? A. Oh, yes.

Q. I think I am accurate in stating that the *F. A. Tamplin Steamship Company v. Anglo Mexican Petroleum Products Company* in 1916, 2 Appeal Cases, at page 397, and the *Chinese Mining and Engineering Company v. Sale & Company*, in 1917, 2 King's Bench, at page 599, and the *Rio de Janeiro Tramway Company* case, which was decided in 1916, but not, I believe, yet reported in the Law

Reports, were all cases in which it was held that a requisition did not determine a charter-party? A. Yes.

Q. I think you were asked last time whether your opinion as to the termination of this charter-party by this requisition, would be in any way affected by reason of the fact that the charter-party does not contain the usual clause excepting the restraint of Princes? A. Yes.

Q. I think I understood you to say that your opinion would not be affected by the absence of that clause? A. No.

Q. I presume we can agree that the British Government have been requisitioning vessels ever since the time of the Proclamation of the 3rd August, 1914? A. Yes.

Q. As this charter-party was entered into on the 6th February, 1915, would not an English Court hold that it was entered into under circumstances under which both parties must be taken to have contemplated the possibility of requisitioning and that, therefore, if the ship owner had failed to protect himself against that possibility, he must suffer the consequences? A. Not in my view. That is an argument which has been frequently used and as frequently rejected by the Courts. That is to say, I may put it in this way: It has been argued in many of the cases where the question has been whether the requisitioning put an end to the contract or not, that the presence in the charter-party of a restraint of Princes clause has actually contemplated the event that has happened, and, therefore, the effect of requisitioning has merely been to suspend under the restraint of Princes clause in the charter the charter-party itself, and not to put an end to it. What the Courts have said is that restraint of Princes in the exceptions clause

is not referring to a restraint by requisition of such duration as will put an end to the whole charter-party, including the exceptions clause. For that reason it is immaterial whether the contract contains an exceptions clause or not, because if the requisitioning puts an end to the contract it puts an end to the restraint of Princes clause in the contract.

Q. Would you be good enough to give a reference to a decided case in which that argument was presented to the Court, and rejected by the Court?

A. I happened myself to be using the kind of argument that you are suggesting to me now in a case before the Court of Appeal last week, and I was told by Lord Justice Pickford, and I think, by Lord Justice Scrutton, that I was merely repeating in another form the often discredited arguments. That was a case of *Arthur Capel & Company v. The Bank Line, Limited*. That you may add to your list of decisions in which the requisitioning was held not to put an end to the charter-party.

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Q. Has the decision of the Court of Appeal in that case yet been given? A. Oh, yes. In that case the charter-party contained an express provision giving the charterer an option to cancel the charter-party in the event of the ship being requisitioned. Mr. Justice Rowlatt had held that the requisitioning put an end to the contract, and rejected the contention of the charterer that the charter-party was not put an end to by the requisitioning, but that its operation was merely suspended; but the Court of Appeal rejected the argument that the fact that the parties had expressly in their contract inserted a clause giving the charterer an option to cancel if the ship was requisitioned, did not in any way affect the question whether the delay

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caused by the requisitioning had put an end to the contract. I think that is an *a fortiori* case.

Q. In all that you have been saying about the effect of this requisitioning, you have assumed, I take it, that this is a charter-party to be governed by English law? A. I am only dealing, and can only, I think, be asked to deal with English law. I would not for one moment attempt to deal with the law of any other country with which I am not familiar.

Q. Am I correct in saying that the only two documents that you have considered in this case with regard to the question of the requisitioning, are the telegram of the 10th April, 1915, and the letter of the 15th April, 1915? A. Yes, those were the only two documents which I was asked to consider.

Q. I notice in your statement of the law that you say "a Court cannot enquire into the reasonableness or necessity of any act of a sovereign done in virtue of his prerogative powers"? A. Yes.

Q. Am I to understand that in your view an American Court should not enquire whether or not this so-called requisition operated as a discharge of this contract? A. Oh, no, I do not suggest that. What I suggest is that if, for example, the American Government were to requisition an American ship, and the question was raised in our courts as to whether the requisitioning was valid or invalid, lawful or unlawful, the courts would accept the statement of any authorized official of the American Government that the requisitioning had been done in the exercise of the prerogative rights of the American Government, but the British courts would still be free to decide the question what the legal effect on the contract before it was of the requisitioning.

Q. I think that you also state in that same statement, that in the case of a requisition by the British Government the statement which should be accepted by a Court as conclusive of the necessity for the requisition is a statement on oath of the proper officer of the Crown, and I think that that is the view of the law that was also expressed by Lord Parker in *The Zamora*, 1916, 2 Appeal Cases, page 107? A. Yes.

Re-examination by Mr. Raeburn.

Q. I do not think that I have much to ask you, as you have already largely re-examined yourself, but we have had, as I dare say you know, evidence from the Director of Transports, Mr. Foley, who gave evidence as to the necessity for the requisitioning of this particular ship? A. Yes.

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Q. Would he, in your view, be the proper officer of the Crown, whose oath would be accepted by the Court? A. He would.

Q. You were asked by my friend about several cases which he mentioned in which the requisitioning by the government had been held not to put an end to a charter-party, and he mentioned the *Tamplin* case, the case of the *Chinese Engineering Company v. Sale*, and the *Rio de Janeiro Tramway Company's* case. Were those all cases of time charter-parties? A. They were.

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Q. Over long periods? A. Over very long periods.

Q. Have there been cases before the Courts of voyage charter-parties which have been held to be terminated by requisition? A. Yes.

Q. You have referred to the more important of those in your written statement? A. Yes, I think I have.

Q. In regard to the case of *Arthur Capel, Limited, v. The Bank Line, Limited*, I think the decision of the Court of Appeal that in the circumstances the charter-party was not terminated, was a decision of a majority? A. Yes, it was.

Q. Lord Justice Scrutton dissenting? A. Yes.

Q. So that at present, as regards the point arising upon that particular charter-party, the opinions are two for, and two against? A. Yes; in that case the circumstances were very peculiar.

Q. In that case was it the fact that the vessel was released as it was said by the owners so that they might deliver her to some certain purchaser with whom they had entered into an agreement for sale? A. Yes, in that case the ship was requisitioned before she was delivered under the time charter, and the charterers contended that after she was released by the Admiralty to the owners, although for the purpose of their delivering her to buyers, that they were entitled to delivery of the ship, or to damages for non-delivery.

Q. The subsequent history of that case yet remains to be seen? A. The contest no doubt will be carried even to a higher tribunal.

Q. You were asked a question or two about the effect of the Courts (Emergency Powers) Act 1917, Section 3. I think my learned friend asked you whether you said that the requirement, regulation, order or restriction referred to in that section, must be a legal requirement, regulation, order or restriction? A. Yes.

Q. I do not know whether your attention has been called to a very recent case reported in Lloyds' List on last Monday, the 25th February? A. No.

Q. A case which came before Mr. Justice Atkin upon an award stated in the form of a special case by arbitrators? A. Yes, I remember it.

Q. I need not trouble you with the point; it concerned the effect upon a certain contract of an order made by the Food Controller? A. Yes.

Q. It is the case of *A. E. Lawrence & Co. v. Elias Buerger & Company*. One of the points that arose was the effect of Section 3 of the Courts (Emergency Powers) Act? A. Yes.

Q. The learned Judge in dealing with that says this: "In these circumstances I am inclined to think there would be protection even though the Government Department in question had no legal authority in fact for issuing this requirement, regulation or restriction." I thought I should call your attention to that, though in fact he gave no decision; he goes on to say: "I do not think it necessary to go so far as to decide that matter in this particular case." Finally, with regard to these documents under which this requisition took place, you refer to the case of *The Sarpen*. Was that a case in which the status of the tug—the tug was called *The Simla*—was in question? A. Yes.

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Q. Did that involve an enquiry into how she had been requisitioned by the Admiralty, and the effect of the requisition? A. Yes, that is so.

Q. Does it appear from the report in that case that the only documents which had passed were two telegrams? A. That is so. The case is reported in 1916 Probate, at page 306, and what you said appears from the report, that the only documents under which the tug was requisitioned were two telegrams.

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Q. Is it anywhere suggested by the Court that the requisition was not a valid requisition? A. No.

Q. Are you aware of any case whatever in the English courts in which it has ever been suggested that a requisition made by a telegram of this sort was invalid? A. No.

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*Deposition of C. R. Dunlop—Redirect.
Deposition of Sir H. E. Richards—Direct.*

Q. You have been informed, no doubt, as to the facts of the present case? A. I have.

Q. That the vessel actually went on service? A. Yes.

Q. That is to say that the Admiralty took her. Would that in itself be a good requisition, in your view? A. It would.

Q. Apart altogether from any documents whatever? A. That is so.

(Counsel and solicitors agreed to waive the reading over to and the signature of this evidence by the witness.)

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SIR HENRY ERLE RICHARDS, sworn as a witness on behalf of the libellant, testified as follows:

Examined by Mr. Le Quesne.

Q. You are Sir Henry Erle Richards? A. That is so.

Q. You reside at 25 Queen's Gate, and have chambers at 4 Temple Gardens, in the Temple? A. Yes.

Q. You were called to the Bar in 1887, and appointed one of His Majesty's counsel in 1905? A.

360 Yes, that is so.

Q. Will you give your age? A. Fifty-six.

Q. You have practised in the Privy Council and in the Prize Court? A. Yes.

Q. And also you are Professor of International Law at the University of Oxford? A. Yes.

Q. You represented Great Britain in the Venezuelan Arbitration in 1903, I think? A. Yes, I did.

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Q. Were you also counsel in the Samoan Arbitration? A. Yes.

Q. And did you represent Canada and Newfoundland in the North Atlantic Coast Fisheries at the Hague in 1910? A. Yes.

Q. For some years were you Legal Member of the Viceroy of India's Council? A. Yes.

Q. You have devoted considerable attention to such questions as the prerogative of the Crown in times of war and other Constitutional matters? A. I have.

Q. I think that you have been good enough for the sake of convenience to put your opinion upon the matters in this case which have been submitted to you into this statement which I now hand in? A. Yes.

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(Document produced and marked "H. E. R. 1.")

Cross-examination by Mr. Raeburn.

Q. I understand your view to be that a telegram of the type of the telegram which was sent or the form of the telegram which was sent, which doubtless you have seen, purporting to requisition the *Baron Ogilvy*, would not be a valid exercise of the Crown's right to requisition a British ship? A. I am dealing with a particular case of a telegram sent by a particular man who gives an account of himself and nothing more; I think that would not be.

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Q. The telegram in question was sent by the Director of Transports? A. It was sent by Mr. Foley.

Q. He is Director of Transports; he has given evidence. He is in fact the Director of Transports, and was the sender, so far as appears from his evi-

dence, of that telegram. In your view, I gather that telegram would not constitute a valid requisitioning of the *Baron Ogilvy*? A. My view is, you must comply with the Proclamation under which the telegram purports to be sent.

Q. Would you agree that the Crown has at common law, general power of requisitioning British ships in times of national emergency? A. The Crown has a general power or prerogative of requisitioning any property within the realm in time of war for the defence of the realm. I do not go as far as to say it has power to requisition property out of the realm. That is a point on which I hold the view that the Crown have no power. I do not dispute the Crown has a power of requisitioning ships, but, of course, one has to remember that this power of requisitioning ships has really only been used to any extent in the present war. I think I have observed in the report of some case that some learned gentleman made research in the matter, and he showed that no ships had been requisitioned in the American War of Independence from 1775 to 1782, or in the war with France from 1793 to 1795, or from 1800 to 1804, or during the war with America in 1812, so that though I do not dispute that there is such a power, I would point out to you that the law about it has not come into question very much. I have taken these figures from the report of the case of the *China Mutual Steam Navigation Company, Limited, v. Sir Joseph Maclay Bart.*, in the Times Law Reports, Volume 34, Number 5, at page 83.

Q. Would you agree that the Crown, by its proper officer, assuming that a national emergency existed, could have validly requisitioned the *Baron Ogilvy* in this present case, she being in this country at the time? A. Yes, if the prerogative was exercised by an official duly authorized.

Q. We have had the particular official here, and he has given evidence. May I just tell you what he said, quite shortly as to that? He said he was the Director of Military Sea Transport. A. May I look at a copy of it?

Q. Yes. It is at the very beginning of his evidence. He said he was Director of Military Sea Transport, and at the time of the requisitioning of the *Baron Ogilvy* in April, 1915, he was Assistant Director (Military) to His Majesty's Director of Transports, and he said further that the Director of Transports was the head of that department of the British Admiralty, which deals with all questions of transport and requisition, that is to say, sea transport, under the direction of the Lords Commissioners of the Admiralty. In your view, would Mr. Foley be a person competent to exercise the prerogative of the Crown in respect of the requisitioning of this vessel? A. No, I think not. Mr. Foley describes himself as an Assistant Director (Military) to His Majesty's Director of Transports, and I understand that he is neither the secretary of the Lords Commissioners of the Admiralty, nor a flag officer of the Royal Navy, holding an appointment under the Admiralty.

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Q. Is it your view that the prerogative of the Crown, in so far as it entitles the Crown to requisition British ships, can only be exercised by the secretary of the Admiralty, or by a flag officer? A. Well, the Proclamation distinctly states that those are the persons who have authority to exercise it, and if there is no other authority shown in this case, my opinion is that an Assistant Director to the Director of Transports cannot exercise the Royal prerogative.

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Q. Is it your view that the Proclamation of the 3rd August limited the prerogative of the Crown

in any way, or limits the way in which it can be exercised? A. I think the Proclamation directs the manner in which the prerogative is to be exercised, but you must remember that it is not any official of the Crown who can exercise the Royal prerogative; we should get into a dreadful state of things if that were so. If you are going to exercise the Crown's prerogative you must have authority from the Crown; I suppose if you hold such a high office as Secretary of State and so forth, the authority would be presumed.

Q. Is it your view that a warrant would be required in order to the lawful requisition of a British ship? A. Under this Proclamation, certainly, but the form of the warrant would be, of course, another matter. I understand that the Admiralty in general comply with the Proclamation by issuing letters signed by one of the officials mentioned in the Proclamation, and that, of course, would be a very different state of things; in this case for some reason unknown, no letter was signed, and there is no other document except the telegram.

Q. The reason which was given was that it was a breakdown of departmental official routine. A. I am afraid that would not give a right to anybody to exercise the Royal prerogative, who had not got it otherwise.

Q. Have you ever seen one of these requisitioning letters, in fact? A. No, but I am not concerned to challenge the suggestion you make that a letter signed by one of these officials specified in the Proclamation might be his warrant.

Q. I was wondering whether it can be said that a warrant was required, a warrant with a capital "W," or a mere letter would be sufficient? A. I do not see the capital "W," nor do I think that the type used by the printer would have much effect on the construction of the Proclamation.

Q. You have not seen a warrant for the requisition of a British ship? A. I think not; I may have read one in a report, but I do not remember one, at any rate.

Q. Is it your view that these British owners of the British steamship *Baron Ogilvy* could have safely declined to put the *Baron Ogilvy* at the service of the government after the receipt of that telegram? A. Yes, I say that the Crown cannot take away private property except by a means which the law sanctions.

Q. I am not sure that it is a question for you, but do you think there is the slightest chance of the *Baron Ogilvy* not having been taken by the government, had the owners refused to allow her to go? A. The government do a number of things in times of war which cannot be justified under the law; you are asking the legal position.

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Q. I prefaced the question by saying I did not think it was a question for you. I dare say you know the Admiralty took this ship in fact, and used her? A. I take it from you. I do not know.

Q. Would that not be good enough as a requisition under the prerogative of the Crown? A. I do not think the Admiralty have power to go without more and take a ship. I do not know what you mean by the Admiralty; some official of the Admiralty, I suppose, went on board and took the ship; that is rather inconsistent with the only document I have read, the letter of April, but you put to me a hypothetical case, not this case, but a hypothetical case of the Admiralty sending down a man to take the ship without any warrant at all. It would depend upon who the officers were, but in my view that would in most cases certainly be illegal. The Crown have no power to take private property in that way; if it exercised its prerogative it must proceed by legal methods.

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Q. Supposing a charterer had brought an action in an English court against the owners of the *Baron Ogilvy* for failing to deliver the vessel to them, and the owners of the *Baron Ogilvy* replied with a plea that their vessel had been requisitioned by the government, and that they were prevented from handing her over to the charterers, would that, in your view, have constituted a good defence, having regard, of course, to the view you have expressed as to the invalidity of the requisitioning document?

A. The question in each case would be whether there had been a legal requisition, because nothing else, as I suppose, would entitle the ship owner to put an end to his contract with the charterer; it would be a question of fact in each case. I have given you my opinion on the facts of this case; there was no sufficient legal requisition to justify the owner in putting an end to his contract with the charterer.

Q. In your view, therefore, as I understand it, it would be necessary for the owners, in order to establish their defence, to prove that the taking of the vessel by the government, or the use of the vessel by the government, was a use to which the government was entitled? A. You are now rather leading me on to topics which I have not considered. My consideration has been limited to the question of what is a legal requisition under this Proclamation, or under the prerogative, and whether there was such a legal requisitioning in this case. You are now asking me questions about the law as between owners and charterers, I think.

Q. Perhaps I was, rather. A. I have not gone into that. You must remember I know nothing of the facts of this case beyond the two documents I have seen and the Proclamation on the points of law.

Q. You are aware, I have no doubt, that since the Proclamation of the 3rd August, many hundreds, I was going to say thousands, of British ships have been requisitioned? A. I will take it from you that they have; I have no knowledge of that.

Q. And many dozens, or a large number, of cases have been fought in the courts of this country in which the point at issue has turned upon the effect of requisitioning of British vessels by the British Government? A. I am not aware of any case in which the Court has had to consider the point that arises in this matter.

Q. You are not aware of any cases in which that point has ever been raised? A. I have not been shown any case in which the essentials of a valid requisition have been brought to the attention of the Court and decided; and, of course, you must remember when you tell me there are so many cases in which requisitioning has been done, that British ship owners are always only too anxious to help the government in time of war; they do not raise difficulties if they can help it; moreover, it is to their interest to keep on good terms with the Admiralty.

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Q. I did not suggest that cases might have arisen as between the owners and the Admiralty, but you are aware of no case in which the validity of the requisition which might have an important bearing upon a dispute between two private individuals has ever been raised? A. No case has been brought to my attention which has any bearing on the particular point upon which I am giving an opinion. I have read the evidence of Mr. Dunlop, and I do not find that he has given any authority for the view which he puts forward, except one case, I think it is in 1916 Probate. I have looked at that

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case, but it seems to me to have no bearing at all upon the matter.

Q. Was that *The Broadmayne*? A. Yes.

Q. Have you looked in the same volume at the case of *The Sarpen*, where a tug was requisitioned? A. No, but if you give me the report I will look at it. (Report handed.) I will take it from you that the case was one in which the ship had been requisitioned by telegram, and the question was whether she was a King's ship so as to be disentitled from getting salvage. Then I observe on the first page that that question of requisition was never questioned. The passage I have before me on page 307, which gives an account of the pleadings, says this: "The Plaintiffs"—and I suppose those were the people claiming salvage—"by their reply specifically admitted that the *Simla* was under requisition by the Admiralty, but alleged that the requisition did not amount to a demise of the Tug or a transfer of ownership to His Majesty, and that the Plaintiffs were not by the fact of such requisition, or at all, deprived of their right to remuneration for the services of the *Sarpen*." It is quite clear on the pleadings, it is admitted, there was a requisition, and no question arose about it.

Q. That was a case in which it would have been important for the plaintiffs to establish if they could, that the requisition was invalid, then there would have been no question of her being a King's ship at all? A. I do not know the facts of that case, but it does not follow from what you say that that is so. The ship might have been taken by consent by the Admiralty, and the same question would have arisen. Here you are asking about the power of the Admiralty to take a ship without consent, which is a different matter.

Q. I happened to be the pleader who admitted the requisition that you have been referring to. There was no question of her being taken with consent.
A. I do not know the facts.

Q. I gather it to be your view that in order to excuse a ship owner from non-fulfilment of a contract through requisition by the British Government, he must show that the requisition upon which he relies, if that is what he relies upon, was a valid requisition? A. That again is rather off the point to which my attention has been directed. I can say this in answer to it, that I think the Crown have no right under the Proclamation or by the prerogative to compel a British subject to give up his ship or other property unless the requisition be made in ways authorized by law.

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Q. Just a question about the Courts (Emergency Powers) Act 1917. I dare say you are familiar with it. Section 3 of the act is the important one, and it provides: "Where before or after the passing of this Act the nonfulfilment of any contract (not being a contract of tenancy) was or is due to the compliance on the part of any person with any requirement, regulation, order or restriction of any Government Department, or of a competent naval or military authority made, issued, given or imposed for purposes connected with the present war, or with any direction or advice issued or given by any Government Department with the object of preventing transactions which in the opinion of the Department would or might be contrary to national interests in connection with the present war, proof of that fact shall be a good defence to any action or proceeding in respect of the non-fulfilment of the contract." Then it deals with evidence of the fact. I ask you to assume this, that the non-fulfilment of the charter-party on the part of the owners of the

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Baron Ogilvy was due to their compliance with a requirement of the British Admiralty, which is a government department. Would that in our English courts be a good defence? A. I have not considered this matter at all. My attention has not been called to this section before, but I should very much doubt whether that would authorize any action of a government department, although such action was entirely illegal. I observe when one comes to naval or military authorities, the section only applies if they are competent, which, I think, refers to those restrictions on the exercise of requisitioning and so on, contained in all the orders in council, and I think also in the Defence of the Realm Regulations.

Q. You observe it merely deals with orders or restrictions of any government department? A. Yes, I should have to consider it. I am not prepared offhand to give an opinion about that. I can hardly conceive that that means to authorize any action, although it is entirely contrary to law.

Q. The question would rather be this, would it not, whether in order to constitute a defence the defendant must show that the requirement with which he complied was a valid requirement? A. Yes.

Q. It is perhaps not fair to ask you much about this, but I thought I might call your attention to a recent expression of opinion, it is no more, by Mr. Justice Atkin, in a case which is reported in Lloyd's List on last Monday, of *A. E. Lawrence & Company v. Elias Buerger & Company*, where the learned Judge deals with that particular section of the Courts (Emergency Powers) Act, and he referred to an order which had been made by the Food Controller. There was a doubt thrown upon the legality of the order, and I think the

learned Judge came to the conclusion the order was illegal. This is what he says about it: "In these circumstances I am inclined to think that there would be protection even though the Government Department in question had no legal authority in fact for issuing this requirement, regulation or restriction. I do not think it necessary to go so far as to decide that matter in this particular case."

Then he goes on to deal with another aspect of it. A. The learned Judge reserved his opinion upon that, and I beg leave to reserve mine. I have not considered this question. I should be rather surprised if any action of any sort or kind by a government department was sufficient to deprive a British subject of his property.

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Q. That was not quite the point I was putting to you; it was if an illegal action of the British Government deprived a defendant of his power to comply with a contract with some other British subject, what would be the effect? A. That would turn on the question of construction, on which I desire to reserve my opinion.

Mr. Le Quesne: I have no questions to ask in re-examination.

Mr. Le Quesne: There have not yet been handed to me the documents or books of Messrs. Hogarth, which contain the conditions on which other vessels belonging to Messrs. Hogarth and this vessel were employed by the Admiralty. I desire to place this on record by way of explanation of any failure on my part to put to Mr. Dunlop, or to Sir Henry Erle Richards, any matters which may arise on these documents.

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(Counsel and solicitors agreed to waive the reading over to and the signature of this evidence by the witness.)

394

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE TEXAS COMPANY,
Libellant,

v.

HOGARTH SHIPPING COMPANY,
LIMITED, as owner of the Steam-
ship *Baron Ogilvy*, and HUGH
HOGARTH & SONS,

In Admiralty.

Respondents.

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The depositions of witnesses taken *de bene esse* before D. S. Phlegar, a Notary Public for the City of Norfolk, in the State of Virginia, pursuant to notice hereto annexed, at the office of Messrs. Baird & Swink, Law Building, Norfolk, Virginia, December 9, 1916, to be read as evidence on behalf of the respondents in the above-entitled cause pending in the District Court of the United States for the Southern District of New York.

PRESENT:

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MESSRS. HAIGHT, SANDFORD & SMITH and HUGHES,
LITTLE & SEAWELL (MR. LITTLE), for the libel-
lant.

MESSEERS. KIRLIN, WOOLSEY & HICKOX and BAIRD &
SWINK (MR. BAIRD), for the respondents.

Stipulation: It is stipulated and agreed that this deposition may be taken by a stenographer and

Deposition of John Thompson—Direct.

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thereafter reduced to writing; that the stenographer's fees may be taxed as a disbursement in this cause; that signing, filing and certification of the deposition is waived, and a copy thereof to be served within a reasonable time on the proctors for the libellant.

JOHN THOMPSON, sworn as a witness on behalf of the respondents, testified as follows:

Examined by Mr. Baird.

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Q. State your name, occupation and your home?

A. John Thompson; master mariner; I was born in the County of Antrim, Ireland.

Q. How old are you, Captain, and how long have you been master mariner? A. I am fifty-two years of age, and I have been master mariner since 1898.

Q. When did you become master of the steamship *Baron Ogilvy*? A. Four years ago now; I forget the month.

Q. What is the flag of that vessel? A. British.

Q. Where is she owned? A. Ardrossan.

Q. Does she fly the British flag? A. Yes, sir.

Q. And are you a British subject? A. Yes, sir.

Q. Who is the owner of that ship, do you know? 399

Mr. Little: The question is objected to.

A. Hogarth Shipping Company.

By Mr. Baird.

Q. Do Hugh Hogarth & Sons own that ship, or have they any interest in her so far as you know?

A. Not so far as I know.

Q. You say the Hogarth Shipping Company, Limited, is the owner? A. Yes, sir.

Q. And that Hugh Hogarth & Sons own no interest in her so far as you know? A. So far as I know.

Q. Are they the agents for the vessel? A. They are the agents and managing owners.

Q. Where are they? A. 24 St. Enoch's Square, Glasgow.

Q. Where was the *Baron Ogilvy* in April of last year, April, 1915? A. London.

Q. London, England? A. Yes, sir.

401 Q. When she came into that port did she have cargo on board? A. Yes, sir.

Q. What? A. Oats.

Q. Consigned to whom, do you know? A. No, I don't know who they were consigned to; I forget.

Q. From what port were they shipped? A. Baltimore.

Q. What time in April, 1915, were you in London, do you recall? A. I could not say the date, but about the first part of April.

Q. Did you receive any orders while in London as to where the ship should go and to whom she was chartered?

Mr. Little: The question is objected to.

A. Yes.

By Mr. Baird.

Q. What orders did you receive?

Mr. Little: The question is objected to if they are in writing unless the writing is produced.

Mr. Baird: Counsel intends to produce all the papers in the possession of the witness.

A. I received orders that the ship was chartered by The Texas Oil Company from Port Arthur, Texas, to South African ports for a cargo of case oil.

By Mr. Baird.

Q. From whom did you receive these orders? A. From H. Hogarth & Sons.

Q. Were they in writing or given verbally? A. In writing.

Q. Have you got that writing? A. I could not say for certain.

Q. Did you receive any charter-party? A. Yes, 404
sir.

Q. Do you mean that the orders were in writing, or that the charter-party was in writing? A. The orders were in writing also saying the ship was chartered by The Texas Oil Company, and to proceed to Port Arthur and load for the South African ports, and also charter-party was enclosed.

Q. Will you make an examination when you return to the ship this afternoon, and if you have those orders, or the charter-party, produce them and file them with the notary in this case? A. Yes, sir.

Q. You can do that on Monday? A. Yes, sir.

Q. You say you received orders and a copy of the charter-party showing that your ship was going to Port Arthur and take a cargo of case oil to South African ports; is that right? A. That is right, 405
sir.

Q. And you say that if those orders are in your possession they are on the ship, and you will produce them and have them to the notary on Monday, this being Saturday? A. Yes, sir. It is possible that they have been mislaid. I have not seen them

for some time, but they ought to be in the ship somewhere.

Q. Did your ship enter upon the voyage from Port Arthur to South African ports? A. No, sir.

Q. Why not? A. She was requisitioned by the government.

Mr. Little: This answer is objected to as since this was the case the requisition is the best evidence, and it is called for.

Mr. Baird: Counsel is informed by the witness that he never saw the requisition papers, as they were served on the owners or the agents of the ship. Respondents' counsel is attempting to show what the master of the vessel actually did and upon what information and instructions he acted.

Mr. Little: The motion is renewed to strike out the answer for the reason that if the requisition was in writing it is the best evidence, and for the reason that it appears from the answer that the Captain's information in connection therewith is only hearsay.

By Mr. Baird.

Q. What government was she requisitioned by?

Mr. Little: Objected to.

A. The British Government.

By Mr. Baird.

Q. Were any papers showing the fact of requisition delivered to you, Captain? A. No, sir.

Q. How do you know that she was requisitioned? A. I was told by our superintendent.

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Mr. Little: The question and answer are objected to, and motion to strike the former answer is renewed.

By Mr. Baird.

Q. What orders did you receive from your superintendent?

Mr. Little: Objected to.

A. The only orders I received, they told me the government had requisitioned the vessel, and started putting wireless into her—fitting up a Marconi room.

410

Mr. Little: The answer is objected to and motion made to strike out.

By Mr. Baird.

Q. What was done to the ship? A. Wireless was put in and a Marconi room built. That was all that was done.

Q. Was that all that was done then? A. At London.

Q. Where were you directed to go? A. To New Orleans.

Q. Where did you go? A. To New Orleans.

Q. What was done to the ship upon your arrival there, if anything?

411

Mr. Little: Objected to.

A. She was fitted up for carrying mules.

By Mr. Baird.

Q. How was she fitted for that purpose?

Mr. Little: Objected to.

412

Deposition of John Thompson—Direct.

A. She was pierced and also fitted up with stalls throughout.

By Mr. Baird.

Q. What do you mean by "pierced"? A. Putting ports along between decks alongside of the ship.

Q. That was for the purpose of giving the animals light and air, I suppose? A. Yes, sir.

Q. How long did that work take?

Mr. Little: Objected to.

413 A. The fitting up about a week—a week to ten days.

By Mr. Baird.

Q. What cargo did you take on at New Orleans? A. Mules.

Q. How many? A. 804.

Mr. Little: Objected to.

By Mr. Baird.

Q. Where did you go? A. Avonmouth.

Mr. Little: Objected to.

By Mr. Baird.

414 Q. Avonmouth, England? A. Yes, sir.

Q. To whom was the cargo of mules consigned?

Mr. Little: Objected to.

A. To the government.

By Mr. Baird.

Q. Did you make delivery of the cargo? A. Yes, sir.

Deposition of John Thompson—Direct.

415

Q. To whom? A. To the government.

Mr. Little: Objected to.

By Mr. Baird.

Q. What did your vessel next do? A. Went back to New Orleans again.

Q. What cargo did she take? A. Mules.

Q. Where did she go? A. Avonmouth.

Q. Did she deliver the cargo? A. Yes, sir.

Q. To whom?

Mr. Little: Objected to.

A. To the government.

416

By Mr. Baird.

Q. What did she next do? A. Went to New Orleans.

Q. What cargo did she take? A. Mules.

Q. Where did she go? A. Avonmouth.

Q. Did she deliver the cargo? A. Yes, sir.

Q. To whom?

Mr. Little: Objected to.

A. The government.

By Mr. Baird.

Q. Where did you next go? A. New Orleans. 417

Q. For a cargo? A. Yes, sir.

Q. What cargo did you take? A. Mules.

Q. Where did you carry them? A. Avonmouth.

Q. Did you deliver them there? A. Yes, sir.

Q. To whom?

Mr. Little: Objected to.

A. The government.

By Mr. Baird.

Q. You said you carried 804 on the first voyage; how many did you carry on the three succeeding voyages? A. I carried 904 the last trip, 903 the trip before, 902 the trip before and 804 the first trip.

Q. How much time did these four trips that you have just described take?

Mr. Little: Objected to.

A. About six months.

By Mr. Baird.

419 Q. For whom were those trips made?

Mr. Little: Objected to.

A. For the government.

By Mr. Baird.

Q. What government? A. The British Government.

Q. Were they made under the requisition you speak of?

Mr. Little: Objected to.

A. Yes, sir.

420 *By Mr. Baird.*

Q. When those four trips were ended what did your vessel do?

Mr. Little: Objected to.

A. Proceeded to New York.

By Mr. Baird.

Q. There she took on cargo, I presume? A. Yes, sir.

Q. Where did she go? A. New Zealand.

Q. For whom did she load cargo in New York?
A. Standard Oil Company.

Q. Was there any representative of the British Government aboard your ship during the trips that you have spoken of?

Mr. Little: Objected to.

A. No, sir.

By Mr. Baird.

Q. You don't know what the terms of the requisition were, do you? A. No, sir.

422

Q. Was the compensation for the use of your ship paid to you or to the owners or agents of the vessel? A. I don't know anything about that, or whether there was any compensation.

Q. You simply received the ship's expenses and wages of master and crew from the owners or the agents? A. From the owners, yes, sir.

Q. You said those four voyages which you made for the British Government occupied about six months? A. Yes, sir.

Q. And from what you say you must have left London for the purpose of entering upon those voyages around the middle of April, 1915?

Mr. Little: The question is objected to.

423

A. Yes, sir.

By Mr. Baird.

Q. Was it possible for you to perform the charter with The Texas Company after the government requisitioned the ship? A. No, sir.

424

Deposition of John Thompson—Direct.

Q. Did the owners say anything on that subject to you—the owners or agents?

Mr. Little: Objected to.

A. No, sir.

By Mr. Baird.

Q. They simply told you that the vessel had been requisitioned? A. Yes, sir.

Mr. Little: The question is objected to and motion made to strike out.

425 *By Mr. Baird.*

Q. And directed you to perform this government service which you have described? A. Yes, sir.

Mr. Little: The question and answer are objected to and motion is made to strike out the answer.

By Mr. Baird.

Q. Where did you say the office of Hugh Hogarth & Sons was? A. 24 St. Enoch's Square, Glasgow.

Q. Have they any office in the United States, so far as you know? A. Not so far as I know.

426 Q. Where is the office of the Hogarth Shipping Company, do you know? A. 24 St. Enoch's Square, Glasgow.

Q. Have they any office in the United States, so far as you know? A. Not so far as I know.

Q. Did you have any knowledge of the making of the charter with The Texas Company until you received a copy of that charter while in London and were told to go to Port Arthur? A. No, sir.

Q. That was the first knowledge you had of it? A. That was the first knowledge I had of it.

Deposition of John Thompson—Direct.

427

Q. Do you know how many days elapsed between the time you were delivered a copy of the charter with The Texas Company and told to go to Port Arthur and the time you were told the vessel had been requisitioned and you must go to New Orleans? A. No, I could not say how many days it was, but it must have been four or five. To the best of my knowledge, it was four or five.

Q. Had your cargo been discharged when you received a copy of the charter with The Texas Company, and were told to go to Port Arthur? A. No, sir.

Q. Had you finished discharging when you were told the vessel had been requisitioned, and that you must proceed to New Orleans? A. No, sir.

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Q. Where did you say the *Baron Ogilvy* is registered? A. Ardrossan.

Q. Where is that? A. About twenty-five miles from Glasgow.

Q. In Scotland? A. Yes, sir.

Q. Is that her home port? A. Yes, sir.

Q. Do you remember when it was that you arrived in New York after the completion of these four voyages for the British Government which you have described? A. No, sir, I could not say for certain.

Q. Can you say approximately when it was? A. Yes, sir, I could. We left New York the 12th of December. We had been there about fourteen days. We called by Hampton Roads for coal, and went on to New Zealand.

429

Q. That means that you must have arrived at New York, after the completion of the four voyages for the British Government, in the latter part of November or the very early part of December, 1915, doesn't it? A. Yes, sir.

430 *Deposition of John Thompson—Direct—Cross.*

Q. Did you come straight to New York after completing your last voyage for the government? A. Yes, sir, after dismantling.

Q. You don't know anything about whether notice of the requisition of your ship was or was not given to The Texas Company, do you? A. No, sir.

Q. There was no reason why your ship could not have performed the charter with The Texas Company if she had not been requisitioned, was there? A. No, sir.

Mr. Little: The question is objected to as leading and suggestive.

431

By Mr. Baird.

Q. I mean by that that there was nothing in the condition of the ship which would have rendered it impracticable? A. No.

Cross-examination by Mr. Little.

Q. You know, Captain, that you did not enter upon this charter from Port Arthur to South Africa? A. Yes.

Q. And the vessel was fit and in condition to enter upon that charter at the time you were in London? A. Yes.

432

Q. Did you say that you had discharged or had not discharged, at the time you got notice to go on this voyage? A. I had not discharged.

Q. How long did you take after that to discharge? A. You might say a week.

Q. And you were discharged when you were informed you were going to be put in the government service? A. No, sir.

Q. You had not finished discharging then? A. No.

Q. Did you take any steps to call the government's attention to the fact that you were under charter? A. No.

Q. So far as you know, nothing was done to inform the government of that fact? A. So far as I know there was not.

Q. Do you know of any efforts being made by your owners or agents to get the vessel requisitioned? A. No, sir.

Q. What is the business of Hugh Hogarth & Sons, do you know? A. Ship owners and ship brokers.

Q. And you say the *Baron Ogilvy* is owned by the Hogarth Shipping Company, Limited? A. Yes, sir.

Q. Did you have any information or suggestion prior to the time you state you were told by the superintendent that the vessel had been requisitioned that she would be so requisitioned? A. No, sir.

Q. Do you know whether the owners made any efforts to have her withdrawn in order to comply with this charter? A. I do not know.

Q. If your vessel had left London upon the completion of your discharge of oats, she would have arrived in Port Arthur in time to have undertaken that charter, under normal conditions, would she not? A. Yes. Of course, I know that the owners fully expected to go to Port Arthur, because we were arranging about provisions.

Q. At what time did you arrive at Avonmouth from your first voyage from New Orleans? A. That I cannot exactly say. We were about six weeks on the trip. We made each voyage in about six weeks.

Q. What time did you leave London for New Orleans? A. That I can't say.

Q. Would you say it was the first half of April, 1915? A. About the middle of April, as near as I can judge.

436 *Deposition of John Thompson—Cross—Redirect.*

Q. And you say you did not get any papers or anything except the mere statement of the superintendent that your vessel had been requisitioned?

A. No.

Q. You never did get any? A. I never did get any.

Redirect examination by Mr. Baird.

Q. Do you know about the time you arrived in New Orleans on the first trip? A. No, sir, I can't say.

437 Q. How long would it take to run to New Orleans? A. It took, as a rule, seventeen or eighteen days.

Q. If, instead of going to New Orleans, you had gone to Port Arthur, would you have arrived at Port Arthur about the time you arrived at New Orleans, or would it have taken longer? A. It would have taken about one day longer.

Q. What did you say in answer to Mr. Little's question that the owners expected you to go to Port Arthur because of the provisions they put in? A. Yes, sir.

Q. What was that? I don't know that I caught your meaning. A. To make up my store list for the voyage.

438 Q. Who told you to make out the store list? A. The owners. It is a customary thing always to do. As soon as we find where we are going we make it out.

Q. Was the store list different from a trip to Port Arthur than it would be from New Orleans to Avonmouth? A. Yes, it would be different.

Q. And you say the owners had given a list to make out from Port Arthur to South African ports? A. Yes.

Deposition of John Thompson—Redirect.

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Q. After the vessel was told to go to New Orleans, were the directions in that regard changed?

A. Yes, they were changed because during the time we were in the mule trade we provisioned mostly in New Orleans.

The further taking of depositions in this case adjourned until Monday morning, December 11, 1916, at the same place.

Office of Messrs. Baird & Swink,
Norfolk, Virginia, December 11, 1916.

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Met pursuant to adjournment of Saturday.

Present: Same parties as heretofore.

JOHN THOMPSON, being recalled for further examination on behalf of the respondents, testified as follows:

Examined by Mr. Baird.

Q. Captain, did you, upon your return to the ship, find the copy of the charter-party between the owners of your steamer and The Texas Company, to which you referred in your testimony on Saturday? A. Yes, sir.

441

Q. Will you please look at the charter-party or paper which I now hand you, and say whether or not that is the document which you received from your owners while you were lying in London in respect to the trip you have testified you were directed to make from Port Arthur to South African ports? A. Yes, sir. This is the charter-party I received from London.

Note: The charter-party is offered in evidence in this case and is marked "Exhibit No. 1"; the same is forwarded as a part of this deposition.

Q. In your testimony on Saturday you said that you got some orders in writing from your owners in regard to the voyage mentioned in this charter-party? A. Yes, sir.

Q. That is the voyage from Port Arthur to South African ports? A. Yes, sir.

443 Q. When you returned to your vessel on Saturday night were you able to find those orders? A. No, I could not find them.

Q. What has become of them, Captain? A. They have been destroyed.

Q. You do not know how they came to be destroyed, or who destroyed them, do you? A. I think that they were thrown overboard. It was in a letter, and the charter-party was enclosed in a letter where the charter-party was, and I keep the letters for a while and then throw them overboard.

Q. That is your common practice, is it, with regard to letters? A. Yes, sir.

Libelant's Exhibit 1.

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NOTE.—This is a charter-party dated April 14, 1915, between J. H. Winchester & Co., agents for the owners of the British steamship *Vimeira*, and the libelant, The Texas Company, whereby the libelant hired the *Vimeira* for a voyage from Port Arthur, Texas, to a port between Cape Town and Delagoa Bay, both inclusive, with a cargo of 220,000 cases, 10% more or less, of 10 American gallons each, of refined petroleum, for the hire of Sixty-six cents (66c) per case, for one port discharge, the vessel to load between April 15, 1915, and May 15, 1915.

The charter-party was produced at the trial and offered in evidence in response to the respondent's First Interrogatory annexed to the answer and calling for the charter-party of the vessel hired by libelant to carry the cargo mentioned in the libel.

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Libellant's Exhibit 2.

Form N Y 52—1—15—1M

STEAM

THE TEXAS COMPANY**PETROLEUM AND ITS PRODUCTS****GENERAL OFFICES**

Houston, Texas

EXPORT DEPT.

17 Battery Place, New York, N. Y.

449

(D. B. Dearborn & Co. Steamship Brokers and Ship Agents 8 Bridge Street, New York.)

(J. H. Winchester & Co. Inc. Steamship Agents and Ship Brokers Produce Exchange, New York)

450

THIS CHARTER PARTY, made in the City of New York, the 6th. day of February 1915. BETWEEN J. H. Winchester & Co., Inc., by cable authority of Messrs. I. B. Pearson & Co., of Glasgow, Agents for Owners of a first class Steam-vessel owned by Messrs. Hugh Hogarth & Sons of Glasgow and name of vessel to be declared on or before March 10th, 1915 classed 100 A. 1. at British Lloyds or its equivalent and to be so maintained during the service, of the burthen of net tons, or thereabouts, register measurement, now
of the first part and THE TEXAS COMPANY, of the second part,

WITNESSETH that the said party of the first part agrees on the freighting and chartering of the whole of the said vessel, (with the exception of the deck, cabin and necessary room for the crew and storage of provisions, fuel, sails, tackles and cables),

unto the party of the second part, for a voyage from Port Arthur, Texas, to a port between Cape Town and Delagoa Bay both inclusive on the terms following:

1. The said vessel shall be tight, staunch, strong and in every way fitted for such a voyage, including proper ballast, and dunnage, and shall receive on board for the aforesaid voyage a full cargo of REFINED PETROLEUM, in charterers' customary low top cases of ten American gallons each, which the said party of the second part doth engage to provide and furnish; the vessel's capacity being guaranteed to be 210,000 cases, 10 per cent. more or less. Charterers guarantee measurement of Refined Oil cases not to exceed two cubic feet, but Charterers have privilege of shipping larger cases, freight to be calculated at a rate per cubic foot equal to one-half of rates per case expressed in Clause 2. 452

2. The said party of the second part agrees to pay to said party of the first part, or Agents, for the use of said vessel during the voyage aforesaid: 47c Forty seven cents for one port discharge, all in United States Gold, on each and every case delivered, whether full, part full, or empty, payable upon correct delivery of cargo at the Port of Discharge, in approved thirty days' sight bills on London at the rate of \$4.80 gold to the £ sterling. 453

3. The Charterer shall have the privilege of shipping general cargo (including Petroleum and/or its products in barrels and/or cases and/or drums and/or crates and/or Turpentine in cases and/or drums) up to 40% of vessel's capacity; the rate of freight per cubic foot on such cargo to be half of the rate of freight per case expressed in Clause 2.

4. No goods or merchandise, except from the said party of the second part, or their Agents, shall be laden on board the vessel without written consent.

5. The vessel shall haul to such unloading berth or berths (where she can lie always afloat, in safety), as may be designated by the Charterers, or their Agents, but, if ordered to haul more than once, the Charterers shall pay all subsequent towage.

455 6. It is agreed that the lay days for loading shall be (if not sooner dispatched) at the average rate of 10,000 cases per running day; Sundays and Holidays excepted, commencing twenty-four hours after the receipt by the Charterers, or their Agents, of written notice that the vessel is ready to receive cargo, with one working day additional to clear at the Custom House. Time occupied shifting ports and/or berths or detention caused by ice, fog, floods, strikes, lockouts or other causes beyond Charterers' control not to count as lay days. The vessel to receive cargo on clearing day, if required by the Charterers, or their Agents, free of claim for demurrage. The cargo to be discharged with customary dispatch for steam vessels

456 7. The Master shall endorse upon the Charterers' copies of this charter party, the number of lay days not consumed at the port of loading and the same shall be allowed to apply on time for discharging at the port or ports of discharge.

8. The lay days for loading are not to commence before April 15th, 1915, except with the consent of the Charterers or their Agents, and if the vessel is not ready to load by two o'clock, P. M. on May

15th, 1915, the Charterers shall have the option of cancelling or maintaining this charter, their decision to be given at once, if the vessel be then at the loading port; but, if the vessel has not then arrived, their decision need not be given until 24 hours after arrival.

9. For each and every day's detention by default of the said Charterers, or their Agents, demurrage shall be paid by the Charterers or their Agents, to the Owners, or their Agents, at the rate of Four (4) pence, British Sterling, per net ton, per like day.

458

10. The cargo to be received and delivered alongside, within reach of the vessel's tackles, where she can lie afloat and in safety.

11. The vessel to be loaded under the usual stowage inspection, if required by the Charterer free of charge to the vessel for such inspection.

12. Vessel's stevedore, for loading and discharging, to be approved by the Charterers or their Agents.

13. The Master to sign Bills of Lading for the cargo at the current rate of freight, if required, without prejudice to this Charter Party. If the aggregate be below the Chartered rate, the difference to be paid by the Charterers or their Agents, in cash, at port of loading, less Insurance. If the aggregate be above the Chartered rate the difference, if not exceeding \$100, to be settled in cash by the Master; if more, by his draft in the Charterers' favor upon the Consignee, payable five days after the arrival of the vessel at the port of discharge.

459

Any such difference to be adjusted before the vessel clears at the Custom House. The Master to call at the Shipper's office to sign Bills of Lading when required.

14. The Charterers' responsibility shall cease when the cargo is all on board and Bills of Lading signed, but the Master and Owners shall have an absolute lien on the cargo for the freight, dead freight or demurrage.

461 15. Funds for the vessel's disbursements (not to exceed one-half of the estimated freight), if desired by the party of the first part, or their Agents, to be advanced by the Charterers on account of the freight to the Master at the port of loading, Master paying 3 per cent. on the amount advanced to cover Insurance and all other expenses; but the Charterers not to be responsible for the due appropriation of the advance by the Master. Such advance to be deducted, in all cases, from the freight earned under this Charter Party, and the Master shall so receipt the advance on the Bills of Lading.

462 16. An address commission of $2\frac{1}{2}\%$ upon the gross amount of freight is to be paid by the vessel and owners to The Texas Company upon completion of loading.

17. Steamer to apply for Cargo and Custom House business to Charterers' Agents at port of loading, paying them the customary fee of Ten Guineas.

18. The vessel to be consigned inward at the port or ports of destination to the Charterers' Agents, paying them the customary attendance fees for attending to the vessel's inward business.

19. The hatches to be opened during the voyage for the purpose of ventilation in fine weather, but only during midday hours.

20. The vessel shall proceed with all possible dispatch to the port of destination, via Cape of Good Hope; with liberty of touching for coal at the different coaling stations customary on that route, but not to remain there longer than is required for coaling; also to tow and to be towed, to assist vessels in all situations and to sail with or without pilots.

21. Should the vessel put into a port of distress, or be under average, she is to be consigned to Charterers, or their Agent or Agents, paying him or them usual charges and commissions, and in case a General Average statement be required, the same is to be adjusted at New York by adjusters to be appointed by the Charterers, who are to attend to the settlement and collection of the average, subject to customary charges; General Average, if any, to be adjusted according to York-Antwerp Rules of 1890, and as to matters not therein provided for, according to the usages and customs of the port of New York. 464

22. This Charter Party shall be subject to the Maritime Rules of the New York Produce Exchange, and any disputes at the port of loading between the Captain and the Charterer shall be settled by arbitration before the Committee on Maritime Affairs of the New York Produce Exchange, whose decision shall be final and binding upon both parties. 465

23. It is also mutually agreed that this Charter Party shall be subject to all the terms and provisions of, and all the exemptions from liability, contained in the Act of Congress of the United States

of America, approved on the 13th day of February, 1893, and entitled "An Act relating to navigation of vessels, etc."; and Bills of Lading to be issued in conformity with such Act.

24. A commission of $2\frac{1}{2}$ per cent upon the gross amount of this Charter is due to J. H. Winchester & Co., Inc., by the vessel and Owners, upon signing of this Charter Party, of which $1\frac{1}{4}\%$ to Messrs. D. B. Dearborn & Co.

467 25. To the true and faithful performance of all and every of the foregoing agreements, we, the said parties do hereby bind ourselves, our heirs, executors, administrators and assigns, and also the vessel, freight, tackle and appurtenances, and the merchandise to be laden on board, each to the other, in the penal sum of the estimated freight under the within Charter.

Charterers have the option of ordering steamer to discharge up to five (5) ports in all, in which case rate of freight is to be $\frac{1}{2}c$ per case extra for each additional port used on the entire cargo, and said ports to be between Cape Town and Delagoa Bay both inclusive. Ports of discharge are to be in geographical rotation. Steamer is to be free of wharfage at port of loading. Steamer's draft not to exceed 24 feet at port of loading.

468 All Bills of Lading given for cargo shipped under this charter party the charterers undertake and agree shall contain the following clause:

"The ship in addition to any liberties expressed or implied herein shall have the liberty to comply with any orders or directions as to departure, arrival, routes, ports of call, stoppages or otherwise howsoever given by His Majesty's Government, or any Department thereof, or any person acting or purporting to act with the authority of His Majesty

or of His Majesty's Government or of any Department thereof, or by any committee or person having under the terms of the War Risks Insurance on the ship the right to give such orders or directions, and nothing done or not done by reason of such orders or directions shall be deemed a deviation."

Should charterers fail to insert said clause Master shall have the right to refuse to sign such Bills of Lading.

VOYAGE CHARTER—Special Clause.

It is a condition of this charter and the charterers undertake that:—

470

(1) The ship shall be employed only in such trades and employments and shall carry only such goods, persons and things as are lawful for a British ship.

(2) The ship shall not be used nor be documented in any such way nor shall she carry any such cargo or any cargo so documented as would expose her to seizure or condemnation by Great Britain or any of her Allies.

(3) There shall not be any breach of any of the warranties which are now or may during the continuance of this charter be contained in the policies or contracts of insurance of the ship with the War Risks Insurance Association in which the ship is entered. The warranties now contained in such policies are as follows:—

471

(a) That the ship shall comply, so far as possible with the orders of His Majesty's Government and the directions of the Committee as to routes, ports of call and stoppages.

(b) That the ship shall not start on the voyage if ordered by His Majesty's Government not to do so.

(c) That the ship shall leave an enemy's port within the days of grace allowed by the enemy and shall comply with the terms of any pass granted by the enemy.

(d) That the ship shall not enter or leave, or attempt to enter or leave, any port which is known to be blockaded by the enemy.

473 Upon breach of any of the conditions and undertakings mentioned in this clause, the owners shall have the right at any time to withdraw the ship from the service of the charterers, but notwithstanding such withdrawal the charterers shall in addition to any liability for damages, continue liable for the hire or freight hereby agreed to be paid.

The above clauses to be incorporated in all bills of lading.

IN WITNESS WHEREOF, we have hereunto set our hands, the day and year first above written.

By cable authority of Messrs. I. B. Pearson & Co., dated Glasgow, February 6th, 1915.

(Sgd.) J. H. WINCHESTER & CO., INC.

A. J. MOURIS, Secretary.

(Sgd.) THE TEXAS COMPANY,

Export Department.

W. B. KNIGHT, Asst. Mgr.

Signed in the presence of

(Sgd.) WALTER JOHNSON

(Sgd.) MELVIN D. GREER

We hereby certify that the foregoing is a true copy of Original Charter Party now on file in our possession.

J. H. WINCHESTER & CO., INC.

J. B. SMULL,

Vice-President

Libellant's Exhibit H. E. R. 1.

475

s. s. *Baron Ogilvy.*

I, Sir Henry Erle Richards, reside at 25 Queen's Gate, London, and my professional chambers are at 4, Temple Gardens, Temple.

I was called to the Bar in 1887 and was appointed one of His Majesty's Counsel in 1905. I have a considerable practice in the Privy Council and in the Prize Court. I am also Professor of International Law in the University of Oxford. I was for some years Legal Member of the Viceroy of India's Council. I have devoted considerable attention to such questions as the Prerogative of the Crown in time of war.

476

My attention has been called to the Proclamation of 3rd. Aug. 1914; to the telegram signed "Transport" dated 10th April 1915; and to the relevant portions of the evidence of Mr. Foley.

The question put to me is whether the telegram is a sufficient requisition of the *Baron Ogilvy*. To that question I answer, "No, it is not." The telegram on the face of it purports to be founded on the Proclamation and one is thrown back therefore to the terms of the Proclamation itself. Now that Proclamation provides for the exercise of the royal prerogative and prescribes the mode in which it is to be exercised. It declares that the prerogative is to be exercised by warrant under the hand of the Secretary of the Lords Commissioners of the Admiralty or under the hand of any Flag Officer of the Royal Navy holding an appointment under the Admiralty. These two provisions are put in for a double purpose, they facilitate the exercise of the prerogative and they give the protection to the subject of the authority of an official of the specified rank.

477

The practice of the Office, according to Mr. Foley, is to send a letter supplementing any telegram, and that letter is apparently signed by the Secretary of the Admiralty or some other official qualified to do so under the Proclamation, and such a letter may well be a warrant within the terms of the Proclamation. But in this particular case, owing to a mistake of the office, there was no such letter and nothing more than the telegram. It follows that there was no valid requisition since the telegram did not comply with the requirements of the Proclamation. The letter of 15th April which has been shown to me does not help matters. It is said that the requisition by the telegram may be justified under the Prerogative, even if it be not sufficient under the Proclamation; but I do not agree with this view. The telegram as I have pointed out purports to derive authority from the Proclamation and not from the prerogative alone. Moreover it is not within the power of any official in the employment of the Crown to exercise the prerogative, he must be an official of high rank or an official specially authorised. Mr. Foley of himself without special authority could not exercise the prerogative and as I have pointed out he did not purport to do so. I have read the evidence of Mr. Dunlop and regret that I cannot agree with his opinion on this point.

Respondents' Exhibit S. C. H. 1.

481

Copy Charter-Party of the *Baron Ogilvy*. (See Libelant's Exhibit 2.)

Respondents' Exhibit S. C. H. 2.

(NOTE: The letters and telegrams are arranged in chronological order, rather than in the order marked by the Commissioner.)

A-1.

25th March 1915.

482

Copy.

Captain John Thompson

S S *Baron Ogilvy*

C/o Messrs Galbraith Pembroke & Co
London

Dear Sirs

We are in receipt of your letter from Baltimore dated 3rd instant. The American Mails are exceedingly irregular, and doubtless we shall receive your subsequent letters shortly.

We note particulars of passage to Baltimore. We had advice of your sailing on the 10th with 39950 qrs Oats. This is of course worse than last voyage and most disappointing. You will doubtless be advising us in your sailing letter on what basis of cubic ft to 20 cwt. We do not know how this works out, but it looks like about 74'.

483

We have of course been greatly disappointed at your being ordered to London as we should have much preferred your going to the Southern French ports and getting out of the submarine area as well

as avoiding the very great risk of being requisitioned for Admiralty service. We are very much afraid of this latter, as at present the Admiralty are urgently in need of vessels of your type for their Mediterranean expedition.

485 You are declared under an open charter for a cargo of Oil from Port Arthur, Texas to the Cape ports. The copy of the charter is enclosed herewith, and if you are visited by any Government Officials you can inform them that the vessel is chartered from the States to the Cape and if necessary exhibit the charter party. Messrs. Galbraith will be your Agents and make all arrangements. We trust that it will be possible to discharge you by elevator and get good despatch such as some local vessels have got in London recently with bulk Oats cargoes. We hope you will get right up to a berth and not be kept waiting at Gravesend. We trust there will be no changes in your personnel. In this respect matters are worse than ever, and your present Officers and Engineers will require to be put on current level.

We intend dry docking you in London if a dock can be obtained, but we have not decided whether to send you to Cardiff for bunkers or to bunker you in London for Newport News.

A.

S/S Baron Ogilvy

Purfleet.

28th March, 1915.

H. Hogarth & Sons

Dear Sirs,

We arrived here at 10 a. m. yesterday after a rather hard passage. Strong easterly winds from the Banks right up to the Channel. Saw no submarines but I believe there were some around. 488

We have only about 40 tons of bunkers on board. Came across a lot of that Liverpool Slack on the way across which burned away very fast. Being no orders at Gravesend I wired you from here to know who the agents were, got your reply and got in communication with them and they hope to take us up tomorrow. I received your letters of the 25 and 28th inst with oil charter party inclosed from Port Arthur, Texas to the Cape Ports, also my account for last voyage and cheque for £56.19.3. which is correct only you have credited me with cash to apprentices and Lascars and charged me with cash from Cullifords which I have in this voyages account. I will keep the account till I get same deducted from this voyages account. The 489
Officers and Engineers have all agreed to remain in the ship without informing them about the raise of pay. The mate asked me if he could bring his wife on board. I consented although no doubt it will cause trouble with the steward as he is a man who does not want to do any more than is really necessary. I have not asked him if he intends remaining but I think he does. I was greatly de-

ceived in the 2nd Mate Douglas. Third Mate Fowlie is all right and I would give him a Second Mate's berth any time. Mate you know all about him. He has not got sufficient men and he thinks you ought to give him a command. He and the steward have got the knife in each other; one making complaints about the other privately. I think if we are going for a long voyage it would be almost advisable to shift one or the other. However it is immaterial.

I note what you say about bunkers in calling at Newport News on the passage out would just lengthen the passage about 630 miles as no doubt we would make as good a passage to the hole in the wall in the Bahamas as we would to Newport. However, the time from the Lizards to Cardiff and back to the Longships is to be taken off that. The Vessel does not get along as well as she did for the revolutions; she must be getting a little foul.

In the event of the 2nd Mate Douglas wanting a holiday or wanting to bring his wife on board what shall I do in the matter? Please inform me in tomorrow night's letter. He would not be much of a loss. Shall I pay off and take the new articles out here or leave it to Cardiff, if we are going there. We might have very little time at Cardiff.

No more at present I must go to post.

Yours truly,

(Signed) JOHN THOMPSON.

P.s. My sailing letter from Baltimore a/c and vouchers went on shore with the pilot at Cape Henry. No doubt you will get it in time. J. T.

B-1.

Copy.

30th March 1915.

Captain John Thompson
S S *Baron Ogilvy*
London

Dear Sir,

We are to-day in receipt of your letter of the 28th instant. So far as we know you are still at Purfleet and Galbraith's still unable to say when you will get into dock. They inform us that you will probably be ordered to Millwall Dock. We hope wherever you go you will get an elevator and a decently rapid despatch.

494

We note what you report regarding Officers and Engineers. Of course you will inform them of the advances of wages as they will soon be informed as to what is current in that respect. We do not fully understand your allusion to Douglas, Second Officer, Has he not turned out satisfactorily? We certainly cannot allow a junior Officer to have his wife on board. In fact, it is an exception for the Mate to have this privilege. With regard to the First Officer and Chief Steward we will allow matters to take their course in the meantime.

495

You have of course been a long time out of dock and it is surprising that the vessel has kept as clean as she apparently has done. We are endeavouring to arrange for docking in the Thames but fear there will be some difficulty as there has been a pressure for dry docks in London. We have practically decided for you to come to Cardiff for bunkers and go from there straight to Port Arthur.

If any of your men want a run off for a few days let them away from London as there will be no time in Cardiff. Our present intentions are to send you from the Cape Ports to Australia for bunkers and load home under contract from Pagoumene (New Caledonia) to Glasgow.

We do not rightly see how matters are to be arranged with your native crew, but at the present moment we are up against so many complications that we need not cross bridges before we come to them. Let us however have your views on the subject.

Yours truly

Sd H. HOGARTH & SONS

P. S. Mr. Hutchison or Mr. Robertson will go to you when you get into dock and get started discharging.

B.

Copy Telegram.

Glasgow
31 March 1915.

To HOGARTH GLASGOW

Admiralty Note *Baron Ogilvy* in London may require requisition her please post plan say when expect discharged

EVENHANDED

C.

Copy.

31st March 1915.

Messrs Harley & Co
London

Dear Sirs,

S S Baron Ogilvy

We have your telegram of date from which we take it that the Admiralty have apparently been questioning you regarding this vessel. Please point out to the Admiralty that we have already with the *Baron Jedburgh*, eight vessels on Government service, a larger proportion of our tonnage than we are entitled to give, and that besides, this steamer is chartered for a cargo of oil from the States to the Cape Ports and thereafter from New Caledonia to the U. K. Continent. We cannot say when she is likely to be discharged.

500

Yours faithfully

Sd H. HOGARTH & SONS

P. S. We are not therefore sending you plan.

D.

501

Admiralty Shipping Agency,
34 Leadenhall Street,
London, E. C.

1st April 1915.

Dear Sirs,

We are instructed by the Director of Transports Admiralty, to inquire as to the positions of say two

502

Respondents' Exhibits.

of your vessels nearest approaching readiness U. K. to commence work on Government Service, if required, and capable of carrying from about 4,000 to 6,000 tons, measurement, of hay. They will be required on this Service for some weeks, and as the next vessel is wanted to commence loading at Belfast on the 6th inst or as soon after as possible, we shall be obliged if you will kindly send us a wire, on receipt, for the information of the Admiralty Authorities.

Yours faithfully

Sd HOGG & ROBINSON

503

Messrs. Hugh Hogarth & Sons
24 St. Enoch Square
Glasgow.

E.

Billiter House
Billiter Street

London E. C. April 1st 1915

Admiralty Dept.

504

Messrs. Hogarth & Sons
Glasgow

Dear Sirs,

S S Baron Ogilvy

We are in receipt of your favor of yesterday's date and note what you say.

The Admiralty have not today referred further to this steamer, but should they do so we must ask you to be good enough to give attention to their demands, although it is perhaps unnecessary for us to say that.

The fact of this steamer already being chartered from States to Cape and thence from New Caledonia @ U. K. cannot be of real concern to the Admiralty, if the needs of the country require your steamer, and we do not think the charterers of these cargoes you mention can have any possible claim if the Government of this country chose to use your boat for the urgent needs of the present time.

506

We note you are not sending us plan, but should later on we be requested to ask you for one, we hope you will kindly send it.

Yours faithfully

HARLEY & CO

C-1.

24 St. Enoch Square, Glasgow,
2nd April 1915.

Messrs. Hogg & Robinson,
Admiralty Shipping Agency Dept.
34 Leadenhall Street,
London.

507

Dear Sirs,

We received by late post today your letter of yesterdays date. The Director of Transports is aware that we have heavy contracts with the Tharsis Co. and the United Alkali Co for the carriage of Copper Ore, at rates ranging from about 40 to 60

508

Respondents' Exhibits.

per cent. of the current rates, to carry out, and which owing to the requisitioning of our handy vessels are at the present moment about 27,000 tons behind in delivery.

Consequently if you will communicate with the Director of Transports, we think you will be informed that owing to the circumstances which were put before him in consequence of the recent requisitioning of the *Baron Yarborough* and the *Baron Kelvin* both of our vessels were immediately released, you will be informed that no further services of our small steamers will be required from us.

509

Yours faithfully

Sd A HOGARTH & SONS

F

Copy.

2nd April 1915.

Messrs Harley & Co.,
London,

510 Dear Sirs,

S S Baron Ogilvy

We have your favor of yesterday's date. We have heard nothing from the Admiralty, and it looks as if they would leave this vessel alone.

Small Tonnage. We have to-day had a letter from Messrs Hogg & Robinson asking us to wire them what handy tonnage we could give them for carrying hay 4000 to 6000 tons measurement We did

Respondents' Exhibits.

511

not wire them as the letter was late of arriving, but we told them that if they consulted the Director of Transports they would be informed that he was aware of our heavy commitments which the handy vessels we had left were barely able to cope with, and that we had reason to believe that no more of our handy vessels would be asked for.

Yours faithfully,

Sd H HOGARTH & SONS.
M. P. M.

512

G.

Admiralty Shipping Agency,
34 Leadenhall Street,
London, E. C.

3rd April 1915.

Dear Sirs,

We thank you for your letter of the 2nd inst.,
You refer to "Handy" vessels as being necessary to be retained by you. The Government requirement, however, as we mentioned, is for vessels to carry 4/6000 tons of hay. Kindly reply further, therefore, on this basis and oblige.

513

Yours faithfully

Sd HOGG & ROBINSON.

Messrs. H. Hogarth & Sons,
24 St. Enoch Square,
Glasgow.

D-1.

Copy.

24 St. Enoch Square,
Glasgow.

6th April, 1915.

Messrs. Hogg & Robinson,
Admiralty Shipping Agency,
34 Leadenhall Street,
London.

Dear Sirs,

515

We have today received your favor of the 3rd inst.

Your letter of the 1st inst asked for tonnage capable of carrying 4000 to 6000 tons measurement of Hay, by which we understood, tons of 40'. We note however you require vessels to carry 4000 to 6000 tons of Hay.

We have no vessels of this type in or shortly due in this Country with the exception of s s *Baron Ogilvy*, now in Millwall Dock. This vessel is, however, chartered to load in the States.

Yours faithfully,

Sd H. HOGARTH & SONS.

516

H.

Admiralty Shipping Agency
34 Leadenhall Street,
London, E. C.

7th April 1915.

Dear Sirs,

We are much obliged for your letter of the 6th inst which however we cannot quite understand as our inquiry—shown in both ours of the 1st and 3rd instant, to which you refer was in respect of a vessel or vessels each capable of carrying 4000 to 6000 tons, measurement (i. e. 40 cubic feet) of hay.

518

The s s *Baron Ogilvy* is suitable for this requirement and we shall therefore be glad if you will kindly keep us posted as to her position and when her discharge will be completed as it is quite possible by that time that it will be found necessary to requisition her for Government service for the purpose we have named. We understand from the Milwall Dock Authorities that she will possibly be clear by Wednesday next.

Yours faithfully,

519

Sd HOGG & ROBINSON

Messrs. Hugh Hogarth & Sons,
24, St. Enoch Square,
Glasgow.

520

Respondents' Exhibits.

I.

Copy Telegram.

1 h 45 London G. 43

Glasgow,

9th April, 1915.

Received at 2.16.

HOGARTH G L W

521 *Baron Ogilvy* Referring to Admiralty Notice Requisition We believe could induce them take her instead for three or four trips New Orleans Avonmouth or Liverpool Fourteen pounds namely Thirteen pounds ten and ten shillings gratuity. Shall we try to do so.

EVENHANDED FEN.

J.

Billiter House,
Billiter Street.
London, E. C.

April 9th 1915.

522

Admiralty Dept.

Messrs. H. Hogarth & Sons,
Glasgow.

Dear Sirs,

S. S. Baron Ogilvy

With reference to notice of requisition by the

their purpose just as well if they were to charter her for voyages from New Orleans to Avonmouth or Liverpool for Mules, at £13. 10. 0. and 10/- gratuity for three or four trips and we believe if you were to authorise us to approach them that we could arrange this matter.

The conditions of course would be the same that are obtaining in the case of your other steamers running under charter to the Admiralty for this mule business.

We await your views on the matter.

Yours faithfully,

524

HARLEY & CO.

K.

Copy Telegram.

Glasgow 9th April 1915

Handed in at 1.13 p. m. Received here at 1.54 p. m.
London G

To HOGARTH, Glasgow.

525

Baron Ogilvy We regret to inform you Admiralty say must requisition this steamer for Countrys need Telegram of Requisition is being prepared and you will receive same later.

Sgd. EVENHANDED FEN

L.

Copy.

9th April 1915.

Messrs. Harley & Co.
London.

Dear Sirs,

s. s. Baron Ogilvy.

527 We have received your two telegrams of this afternoon and we confirm our telegram in reply.

We have intimated to Hogg & Robinson that the vessel is committed for further business but probably the requisitioning arrangement which you refer to will be that of another department and it will be as well to make them clear, that the vessel is fixed for oil from the States to the Cape and thereafter from New Caledonia home. Meantime, of course, we have not received a requisitioning telegram and cannot move in the matter.

Yours faithfully,

(Sgd.) H. HOGARTH & SONS.

M.

BILLITER HOUSE,
Billiter Street,
London, E. C.

April 9th 1915.

Admiralty Dept.

Messrs. H. Hogarth & Sons.
Glasgow.

Dear Sirs,

530

s. s. Baron Ogilvy.

We are sorry that we have had to advise you to-day that the Admiralty inform us they require this steamer for the needs of the Country.

A formal telegram of requisition is being prepared and you will receive it in due course.

It is very regrettable that the Admiralty requirements are such that they must have this steamer seeing the many other boats of yours they have requisitioned, but apparently the position cannot be helped.

We believe you will appreciate that our Government would not needlessly disturb any steamer's commitments if they could avoid it.

531

Yours faithfully,

HARLEY & CO.

M-1.

Copy of letter addressed to The Director of Trans-
ports.

9/4/15.

Sir,

*S. S. Baron Ogilvy.**Now London Expected discharged Monday.*

533

With reference to your verbal notice of requisitioning this steamer, we beg to say that if it would suit your purpose equally well to charter her for four trips from New Orleans to Avonmouth or Liverpool for the conveyance of Mules, that owners would be agreeable (you nevertheless remaining responsible for any third party claims as under requisition) to undertake that employment on being paid freight at the rate of £13. 10. per head of mule put on board, plus 10/- gratuity on the number landed alive.

Owners undertake all the fittings, foddering, electric light wireless telegraphy, to supply attendants etc. in the usual manner as they are doing in the case of the other "Baron" steamers at present under your employment, and they would do their best to carry out this work to your satisfaction.

534

In the event of your agreeing to this proposal the steamer would fit up at New Orleans to carry as much mules as possible under the supervision of your Officer there.

If this suggestion meets your approval we shall be glad of an early reply owing to the prompt position of the steamer in order that owners may make the necessary arrangements.

We are, sir,

Your obedient servants,

Sd. HARLEY & CO.

N.

Billiter House,
Billiter Street,
London, E. C. April 9th 1915.

ADMIRALTY DEPT.

Messrs H. Hogarth & Sons
Glasgow.

Dear Sirs,

S S Baron Ogilvy

536

Since writing we have your telegram and note contents.

We do not know why Messrs. Hogg & Robinson should trouble you.

The department they follow is quite distinct from the department we are following.

We understand the requisitioning of the *S S Baron Ogilvy* is absolute, and under the conditions of requisition you will note that the owners are indemnified against third party claims.

We enclose you copy of requisition terms recently arrived at in case you have not already received one, and we have already pointed out to the Admiralty, earlier to-day, that this steamer is under commitment for other employment but they replied they could not help that as they required the boat and that any claims that might subsequently come forward would have to be met in the usual manner.

537

Yours faithfully,

HARLEY & CO.

538

Respondents' Exhibits.

O.

Copy Telegram.

Glasgow April 10th 1915.

S/48 O H M S ADMIRALTY London

HOGARTH GLASGOW S S *Baron Ogilvy* is requisitioned under Royal Proclamation for Government service

TRANSPORTS.

539

E-1.

24 St. Enoch Square,
Glasgow,
10th April, 1915.

Messrs. Hogg & Robinson,
Admiralty Shipping Agency,
London. E. C.

Dear Sirs,

S S Baron Ogilvy

540

We have duly received your favor of 7th instant.

The information you have received respecting this vessel from the Millwall Dock Authorities is approximately correct and according to present arrangements she is to dock in the Millwall Graving Dock early next week.

We beg, however, to advise you that we have to-day formal notice of requisition from the Director of Transports for this vessel. This makes the ninth vessel of our comparatively small fleet on Govern-

Respondents' Exhibits.

541

ment Service and we sincerely trust that the Admiralty will now see fit to leave the remainder of our Fleet alone as we know of no firm of Tramp Shipowners with the same proportion of vessels on Government service that we have.

We think she is intended for the Mule Service.

Yours faithfully

Sd H. HOGARTH & SONS

P.

Billiter House,
Billiter Street,
London, E. C.

542

April 10th 1915.

Admiralty Dept.

Messrs. H. Hogarth & Sons.
Glasgow.

Dear Sirs,

S. S. *Baron Ogilvy*.

We are in receipt of your favor of yesterday's date.

543

As you imply Messrs Hogg & Robinson have nothing whatever to do with the Department with whom we are dealing.

Messrs. Hogg & Robinson merely act as the City Agents for the Admiralty as regards stores. That is they look after the shipments of hay, Army stores, Navy stores that are required at various places abroad but even for that business at the moment they are not wanting anything very much.

They were pressed a little while ago for tonnage and thinking the London Brokers were not giving them all the help they could they sent a whip round to owners themselves.

We however, keep in close touch with Hogg & Robinson and whenever they have anything good to work upon we let our friends know.

You will now have received a formal telegram from the Admiralty requisitioning this steamer under Royal Proclamation for Government Service.

The Admiralty have also sent us a similar telegram.

As they had not sent this message off last evening when we saw them they could not proceed to discuss the alternative suggestion that we have in hand, but we are seeing them at noon today and will advise you further.

Yours faithfully,

Sgd HARLEY & CO.

Q.

Billiter House,
Billiter Street,
London, E. C.

April 10th 1915.

Admiralty Dept.

Messrs. H. Hogarth & Sons.
Glasgow.

Dear Sirs,

S. G. Baron Ogilvy.

We have now called at the Admiralty and lodged with them a letter as per enclosed copy.

Respondents' Exhibits.

547

They told us they accepted the proposition contained therein and will be writing us formally to-night.

Meantime they told us we could telegraph you that the matter was in order.

They also asked for further tonnage.

NEW ORLEANS @ Avonmouth or Liverpool—mules
—Three or four voyages Montreal or Newport
News @ Avonmouth or Liverpool Horses
£13. 10. 0. Four or five voyages.

Monte Video @ Avonmouth or Liverpool one voyage
Horses April/May

548

and if you can propose us further tonnage we shall be glad to hear.

Yours faithfully,

Sgd HARLEY & CO.

R.

10th April 1915

To the Director of Transports.
Admiralty.

Sir,

549

S. S. *Baron Ogilvy*

Now London Expected Discharged Monday.

We beg to acknowledge receipt of your notice of requisition of this steamer for Government service.

Permit us to say that if it would suit your purpose equally as well to charter her for four trips from New Orleans to Avonmouth or Liverpool for

1
8
3

550

Respondents' Exhibits.

the conveyance of mules that owners would be agreeable to undertake that employment (you nevertheless remaining responsible for any third party claims as under requisition) on being paid freight at the rate of £13.10.0 per head of mule put on board plus 10/- gratuity on the number landed alive.

Owners would undertake all fittings, foddering electric light wireless telegraphy, supply attendants etc. in the usual manner as they are doing in the case of their other "Baron" steamers at present under your employment, and they would do their best to carry out all work to your satisfaction.

551

In the event of your agreeing to this proposal the s. s. *Baron Ogilvy* would erect fittings at New Orleans to carry as many mules as possible under the supervision of your Officer there.

An early reply owing to the prompt position of the steamer is requested

Your obedient servants,

Sgd HARLEY & CO.

We estimate this steamer's position would be as under

	1st voyage ready New Orleans about 16th May
	2nd " " " " about 30th June
552	3rd " " " " about 15th August
	4th " " " " about 1st October

S.

Copy Telegram.

12 h 48 London G. 39

Glasgow.

10th April 1915.

Received here at 1.16 p. m.

Hogarth Glasgow.

Baron Ogilvy arranged four mule trips Admiralty also want more steamers namely Monte Video to Avonmouth or Liverpool Horses April May one voyage also from Montreal or States Avonmouth or Liverpool Horses several voyages.

554

EVENHANDED FEN

T.

Copy Telegram.

10th April 1915.

H.M.S.

Admiralty London.

To

Evenhanded Fen Ldn.

555

Your offer *Baron Ogilvy* four voyages conveyance of mules New Orleans to Avonmouth or Liverpool freight £13.10.0 per head gratuity 10/- each animal landed alive is accepted stop please say when and where ship can be inspected.

TRANSPORTS.

U.

Extract.

10th April 1915.

MEESRS Harley & Co.
London.

Dear Sirs.

We have your favours of yesterday's date.

557 "Baron Ogilvy." We note all you write, and would advise you the letter you have sent to the Director of Transports is quite in order. We wired you to-day that we had now received official notice from the Director of Transports that he has been forced to requisition this steamer. We asked you in our wire to make arrangements to have her taken up on the "per head mule" basis, for four trips, as we prefer it to the 11/- Time Charter, and no doubt we will have word from you shortly that this has been arranged. Mr. Hutchison, our Superintendent, is presently in Cardiff attending to "Baron Polwarth," but as she sailed at noon for New Orleans, he leaves at 3 p. m. for London to have "Baron Ogilvy" fitted out with "Wireless" etc. etc., and drydocked. He will no doubt call on you on Monday.

558

* * * * *

Yours faithfully,

Sd. H. HOGARTH & SONS
J. B. H.

V.

Extract.

12th April 1915.

Messrs. Harley & Co.

London.

Dear Sirs,

S. S. Baron Ogilvy.

We are in receipt of your two letters of Saturday 10th instant with copy of your letter of Saturday to the Director of Transports and we note that the proposal therein is duly accepted by the Admiralty. We are accordingly proceeding with the fitting of the vessel for mule business

560

* * * * *

Yours faithfully,

Sd. H. HOGARTH & SONS

J. B. H.

 Copy.

Messrs Harley & Co. to Messrs. H. Hogarth & Sons

12th April, 1915.

Admiralty Dept.

561

Copy of telegram received from the Admiralty:

10th April, 1915.

Your offer *Baron Ogilvy* four voyages conveyance of mules New Orleans to Avonmouth or Liverpool freight £13.10. per head gratuity 10/- each animal landed alive is accepted stop please say when and where ship can be inspected.

W.

Billiter House.
 Billiter Street.
 London, E. C.

April 12th 1915.

Admiralty Dept.
 Messrs. H. Hogarth & Sons.
 Glasgow.

563 Dear Sirs,

Your favours of Saturday's date to hand for which we thank you.

S. S. Baron Ogilvy We note what you write and have now received a telegram from the Admiralty formally confirming this steamer for four voyages for mules.

We enclose you copy of this message.

We sent down to the steamer this morning and hope later on to have a visit from Mr. Hutchinson (Have since seen him).

Meantime as the Admiralty want to inspect the boat we are arranging for them to do so.

S. S. Baron Jedburgh We note what you say, and that she is only taking troops and stores.

564

We will try to find out, if it is at all possible, if there is any probability of this boat being released.

As advised you on Saturday the Admiralty want more steamers:—

New Orleans @ Avonmouth or Liverpool—mules. Four voyages

Montreal or Newport News @ Avonmouth or Liverpool—Horses—Five voyages.

Respondents' Exhibits.

565

Monte Video @ Avonmouth or Liverpool—
Horses—One voyage.

Yours faithfully,

Sgd HARLEY & CO.

—
X.

Extract.

13th April 1915.

566

Messrs Harley & Co.
London.

Admiralty.

Dear Sirs,

.

Baron Ogilvy Thanks for copy of telegram from
the Admiralty formally confirming the arrange-
ment whereby this vessel is to be employed as a
mule carrier.

.

Yours faithfully,

567

Sd. H: HOGARTH & SONS.

Y.

Admiralty
15 April, 1915

Gentlemen :

With reference to your letter of the 10th inst. and in confirmation of my telegram of the same date, I beg to inform you that your tender of the s. s. *Baron Ogilvy* is accepted for the conveyance of 672 mules from New Orleans to Avonmouth or Liverpool for four voyages the first homeward sailing to be about 16th May.

569

The conditions of acceptance are as follows:—

1. The rates agreed are:—

Freight per mule shipped	£13.10.0
Gratuity on each animal landed alive	10.0

2. Conditions to be as at present operative in the case of other vessels belonging to Messrs. Hogarth & Sons engaged in this service.

3. Ship to be fitted at New Orleans fittings to be erected according to Specification T.77 to the satisfaction of the Remount Officer and to be made good between voyages at Owner's cost.

570

4. In carrying out the work of fitting attention must be paid to the following requirements:
"Main deck to be pierced at sides for side scuttles, additional electric lights to be fitted

Respondents' Exhibits.

571

Scuppers permanent fresh water
Service to Mule Decks, with the
necessary tanks, pumps and hoses
and accommodation for Officers,
Foremen and attendants with a room
for gear, pharmacy etc.

VENTILATION Additional ventilation
is required, by fitting side
scuttles, wind scoops and windsails
as necessary. It will also be necessary
to fit exhaust fans to Mule Decks.

I am,

Gentlemen,

572

Your obedient Servant

Sgd E. J. FOLEY
Director of Transports.

Messrs. Harley & Co.
Billiter House,
Billiter Street, E. C.

573

Z.

Billiter House,
Billiter Street,
London, E. C.
Admiralty Dept.

April 16th 1915.

Messrs H. Hogarth & Sons.
Glasgow.

Dear Sirs.

S. S. Baron Ogilvy.

Herewith we beg to hand you copy of confirmatory letter regarding this steamer which we have received from the Admiralty.

You will note they have put in 672 mules and we called upon them pointing out that this is incorrect and that steamer is engaged for as many as she can carry under the supervision of the Remount Officer at New Orleans.

To this they quite agreed but they said their Officer has been on board and made a measurement of steamer and has sent the Admiralty a full return.

576 This must be wrong, because when the Admiralty Official went on board he merely made a superficial inspection as to side lights etc. etc. and did not measure steamer up at all.

Anyway the Admiralty are quite satisfied that steamer may carry as many as she can subject to N. Orleans Officer.

They mentioned incidentally today about your other boats carrying so many more mules than was estimated on this side.

Respondents' Exhibits.

577

They did not quite know how it came about, but apparently were satisfied, and we pointed out to them the obvious fact that the mules are being carried splendidly without practically any loss, with which they concurred.

We have given Mr. Hutchison copy of clauses Nos. 2, 3, & 4 in the Admiralty letter.

Yours faithfully,

HARLEY & CO.

578

Respondents' Exhibit C. R. D. 1.

CHARLES ROBERTSON DUNLOP, of 34 Hyde Park Gate, London S.W. Barrister-at-Law, aged 41 years and upwards, doth depose and say as follows:—

I am a member of the English Bar. I was called by the Honourable Society of the Inner Temple on May 1st, 1901, I have a considerable practice in the Commercial and Admiralty Courts and, since the outbreak of the war, in the Prize Court. For over six years I have held the appointment of Standing Counsel to the Lords Commissioners for executing the office of Lord High Admiral of the United Kingdom. I have made a study and have knowledge of the prerogatives and powers of the Crown and Government under English law and particularly as to the power of the Crown and Government to requisition the property of subjects during time of war.

579

The King of the United Kingdom has the right and power in virtue of the Royal Prerogative to requisition any British ship when national emer-

gency exists rendering it necessary to take such ships for preserving or defending national interests. Lord Justice Swinfen Eady in the course of his judgment in the Court of Appeal in *The Broadmayne* (1916) P. 64 at p. 67 said "It is beyond dispute that it is part of the prerogative of the Crown in times of emergency to requisition British ships."

581 Although a very large number of British ships have been requisitioned during the present war by the British Admiralty representing the Crown and in many cases the effect has been to divert the ships from employment more profitable to the Owners or Charterers or to interfere seriously with their business. There is no case, so far as I have been able to trace, in which the right of the crown to requisition has been questioned. If it could have been questioned, I am sure that it would have been.

The right of the Crown to requisition ships was not disputed in *Rex & Hampden* (1637) 3 Howell's State Trials 826. In that case and in the case of *Alexander Bradfoot* in Foster's Crown Cases (1722-60) p. 154 will be found reference to numerous precedents for the seizure or imprisonment of merchant ships into the service of the Crown by virtue of the Royal Prerogative for the defence of the Realm in time of war.

582 According to the Black Book of the Admiralty, folio 28-29 and 157-8 the Admiral might by the ancient laws of England arrest any ship for the King's service. In the *Matter of a Petition of Right* (1915) 3 K.B. 649, Mr. Justice Avory said that the Case of *Rex* and *Hampden* and other authorities established that by the English Constitution the defence of the Realm is entrusted to the Crown that the law has entrusted His Majesty with the care of this defence, and that in this business

of defence the "Supreme potestas" is inherent in His Majesty, and that in times of war the maxim "Salus populi supreme lex" must prevail. In the Courts of Appeal, where the judgment of Mr. Justice Avory was affirmed, Lord Justice Warrington at page 665 said that "it cannot be disputed that the King, as the Supreme Executive Authority, was and is now by virtue of the Prerogative, entitled in circumstances of national emergency to take and use the property of a subject or otherwise interfere with private rights in order to provide for the safety of the public and the defence of the Realm." And at page 666 the learned Lord Justice pointed out that the right was not confined to the doing of what is necessary for the conduct of actual military operations, and that the only condition which must be fulfilled is that the act in question, having regard to existing circumstances, must be necessary for the public safety and the defence of the Realm. As is indicated in the Authorities above referred to and is confirmed in Chitty's prerogative of the Crown at pages 44, 48 and 50, the Common Law of England, having vested in the Kings the right to make war and conduct it, has necessarily and incidentally assigned to him the various prerogatives which may enable him to carry it on with effect. The King may exercise the prerogative through any authorised officer or branch of the Executive Government.

The British Admiralty is an integral part of the Government of Great Britain and Ireland. The Lords Commissioners of the Admiralty are an integral part of the Government of Great Britain and are a branch of the Executive Government, and are authorised and empowered to requisition any British ships on behalf of the Crown. This clearly appears from the terms of the Proclamation

dated the 3rd August, 1914, a copy of which I produce.

587 This Proclamation does not create, limit or extend the right of the Crown to requisition British ships. The right of the Crown exists at Common Law and may be exercised without and independently of any Proclamation. The Proclamation is issued for the convenience and instruction of the public, to make known the fact that a national emergency has arisen, and that the King intends to exercise his prerogative right to requisition ships belonging to his subjects for the purpose of preserving or defending national interests, and also to indicate the manner and the circumstances in which and the terms on which it is intended that the prerogative power shall be exercised

588 No particular form is necessary for the due exercise of the power of requisitioning a British ship. It is sufficient if a Notice is given by a duly authorised official of the Crown to the Owner or Manager of the ship, intimating to him that the ship is required for the use or the service of the Crown. Thus in *The Sarpes* (1916) P 306 a British Tug was requisitioned by means of a telegram from the Admiralty Authorities at a Government Dockyard, requesting the Owners to send their Tugs to the Dockyard. Instances could be multiplied of cases where the requisitioning has been effected without service of any formal official document.

The documents shown to me viz:—a telegram dated 10th April 1917 and letter 15th April 1917, constituted a valid and effective requisitioning of the *S. S. Baron Ogilvy* and was a valid exercise of the King's Prerogative.

As between the Crown and the Owners of the said ship, the effect of the said documents was explained by Lord Justice Pickford in the *Broad-*

mayne (1916) P. at page 73, in the following passages from his Judgment: "It was under the Proclamation of August 3rd 1914, that the ship was requisitioned and that authorised the Lords Commissioners of the Admiralty to requisition and take up for the service of the Crown any British ship for certain service on condition that the Owners should receive payment for their use and for service rendered at an agreed amount, or if there be not an agreed amount, an amount to be settled by a Board of Arbitration appointed by the Crown. It must be taken that she was requisitioned for service of the Crown at a rate of remuneration which would be settled in the future, or if not settled, at a reasonable rate of remuneration. That is really nothing more than a hiring of the ship, and the effect of the requisitioning is that His Majesty has the power to make the owner of the ship come to that hiring agreement. The Owner has no alternative as to whether he will accept the proposition of hiring or not, but the vessel is after all a hired ship. It does not take the property of the ship out of the owner and vest it in the Crown." And at page 75 the learned Lord Justice said that "the rights of the Crown are to have her services during the time she is requisitioned." The passages I have quoted accurately, in my opinion, state the effect of the document requisitioning the steamer in the present case. The Owners when they received the document were bound to put the steamer at the disposal of the Crown and employ her in the service of the Crown.

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591

The Owners on receiving the Notice of Requisition were bound by law to obey it. If they had disobeyed it they would have been liable to punishment by fine and imprisonment. It would be misdemeanor. In my opinion, the Crown could also

compel the Owners to obey the Notice by obtaining from the Court an Order to that effect. The right to requisition could also be enforced by the Crown by seizing the ship on the high seas or in British territorial waters. It might also be indirectly enforced in a foreign port by instructing the British Consul or other British representative at such port to refuse to give the Master the papers necessary to enable the ship to be cleared from the port. See the case of *The Athanasics* decided in the United States District Court, in which a Greek steamship requisitioned by the Greek Government could not clear from New York without her papers and the Greek Consul who had the papers would not allow her to obtain clearance unless she loaded for the Greek Government.

593

The Statement on oath of the proper officer of the Crown that the ship was urgently required for use in connection with the Defence of the Realm, the prosecution of the war, or any other matters involving national security, ought, as a rule, to be accepted by any Court as conclusive of the fact. See *The Zamora* (1916) 2 A. C. 77, at page 108. As Lord Parker in delivering the Opinion of the Privy Council in that case said. "Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a Court of law or otherwise discussed in public."

594

See also the Judgment of Lord Justice Warrington in *Petition of Right* (1915) 3 K. B. at page 666, and of Jessel, Master of the Rolls in *Rawley v Steele* (1877) Law Reports, 6 Chancery Division, at page 527. A Court cannot enquire into the reasonableness or necessity of any act of a

Sovereign done in virtue of his prerogative-powers. As was said by Mr. Justice Story in *The Invincible* 2 Gall. 28 to page 44, in a passage cited with approval by Lord Parker in *The Zamora* "the acts done under the authority of one Sovereign can never be subject to the revision of the tribunals of another Sovereign." The Privy Council in *The Zamora* restated the law laid down by Mr Justice Story in *Maisonnaire and Keating* 2 Gall, 324 that "An Act though illegal by International Law, will not on that account be justiciable in the tribunals of another power, at any rate if expressly authorised by order of the Sovereign on whose behalf it is done."

596

As was pointed out by Lord Justice Pickford in *The Broadmayne*, there is no particular magic in the word "requisition". When a ship is requisitioned, her owners are compelled by law to enter into a hiring agreement with the Lords Commissioners of the Admiralty representing the Crown, and the terms of such agreement, if not arranged by the mutual consent of the Admiralty and the owners, have to be arranged by the Admiralty Transport Arbitration Board, which was constituted & appointed by the King for the purpose. The effect of the Notice of Requisition being to compel the owners to enter into an agreement with the Admiralty for the hiring of the ship for Government service, it is immaterial whether the ship is then in a foreign, neutral, or allied port or not. The Notice must be obeyed by the Owners personally. Instances are numerous during the present war of vessels requisitioned by the British or Allied Governments in foreign ports without question or protest from any person. No question has, as far as I am aware, been raised as to the legality or binding effect of a requisition notice served on

597

the Owner or Master of a ship in a foreign port. The facts in *Capel* and *Suledi* 1916. 1 K. B. 439, affirmed by the Court of Appeal (1916) 2 K. B. 365, are illustrative of the point. In that case a Greek ship, whilst under Charter to British Charterers, was requisitioned by the Greek Government by a notice served by the Greek Consul on the Master of a ship when she was in a French port, ordering him to proceed with the ship to Greece. In an action by the Charterers against the Shipowners for alleged breach of Charter, the validity of the Notice was not and could not be questioned. No question can or need arise as to infringement of neutrality if the ship is in a neutral port. The Admiralty, if the Notice of Requisition is obeyed, need not and generally do not take possession of the ship. She usually remains the property and in the possession of her Owners, subject to their legal duty to employ her in the service of the Government. I am not aware of any case in which during the present war the owners of any British ship have refused to obey or comply with a Notice of Requisition, but if a case had arisen and the ship concerned was in a foreign neutral port, there would have been no need for the admiralty to attempt to take possession of the ship in such port. The Admiralty could wait until she left the port and was outside neutral territorial waters. But if they did take possession in a neutral port and if such act constituted an infringement of neutral rights, the objection could only be taken by the Government of the Neutral State and not by Charterers or any private persons whose interests in the ship were affected by the requisitioning. See *The Eliza Ann* I Dods, page 244 and the *Twice Gebroeders* 3, Christopher Robinson, page 162.

599

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As to the effect of requisitioning on the liability of the ship to be arrested or seized in any legal proceedings in a British or foreign Court, the English law on the subject is clearly stated by the Court of Appeal in the case of *The Broadmayne* already referred to. In that case Lord Justice Swinfen Eady said "It is clear that a ship which is requisitioned by the Crown is as free from arrest as a King's ship of war would be, and the exemption extends as well to claims of Salvage as to claims of collision or other claim. The grounds upon which the exemption exists were fully stated in the Judgment of the Court of Appeal in the case of *The Parlement Be'ge* 8 P. D. 197, 204, 210, where the whole question is discussed".

602

The learned Lord Justice after reading the material passages from the Judgment of Lord Esher, then proceeded to point out that the fact that the effect of requisitioning a ship was not to change the Ownership, "does not prevent a ship so long as she remains under requisition being in the service of the Crown, and as such exempt from process of arrest." Lord Justice Bankes, in delivering Judgment to the same effect, said that the requisition was made under the prerogative of the Crown, and the vessel, while the requisition lasts is "*Publicis usibus destinato*" and as such not liable to the claims or demands of private persons. In *The Constitution* (1879) 4 P. D. 39, Salvage Services were rendered on the English coast to a United States Frigate which had on board a cargo alleged to belong to private individuals, of which the Government of the United States had for public purposes charged itself with the care. The salvors instituted an action in the English Admiralty Court for salvage against the frigate and her cargo, but the Court refused to order a warrant to issue for the

603

arrest of the ship or the cargo, and held it had not jurisdiction to entertain the suit against either the ship or the cargo. See also *The Messicano* 32, T. L. R., page 519. Objection to jurisdiction over a requisitioned or other public ship should, however, be taken by a representative of the Government in whose service the ship is against which proceedings are taken or threatened.

605

In my opinion the effect of the requisitioning of the *Baron Ogilvy* by the British Government was to relieve the Owners of any obligation to perform the Charterparty dated the 6th February 1915, or to pay damages for not performing it, and was to put an end to the Charter Party.

In *Shipton Anderson & Co & Harrison Brothers & Co* (1915) 3 K. B. 676, the owner of a specific parcel of wheat in a warehouse agreed in writing to sell it, but before delivery the wheat was requisitioned by and delivered to the British Government under an Act of Parliament, passed before the date of the Contract, which gave the Government power to requisition the wheat.

606

The Buyers claimed damages for non-delivery, and on their behalf it was contended that as the parties had not stipulated in the contract that the Seller was to be relieved from liability if performance was prevented by the Government the contract was absolute and the Seller was liable to pay damages for not performing it.

Lord Reading, Lord Chief Justice, decided that the Seller was excused on the ground that the contract was subject to an implied condition that if the Government requisitioned the wheat and rendered it impossible for the Seller to perform the contract he should be excused from performance. The principle deduced by Lord Reading from the Authorities was that a party to a contract is ex-

cused from performance or from any liability to pay damages for non-performance if the act to be performed is rendered unlawful or impossible of performance by a lawful Act of State subsequent to the making of the contract.

Mr. Justice Darling agreed with the Judgment of the Lord Chief Justice, and added that "*Salus populi suprema lex*" was a good maxim and that the enforcement of that essential law gives no right of action to whomsoever may be injured by it.

Mr. Justice Lush gave judgment to the same effect and said that the case clearly fell within the principle so often acted upon, that inasmuch as there had been no default on the part of the Vendor, and inasmuch as that which made it impossible for him legally to perform his obligation was an Act of State, it followed that he was excused from performance.

608

Shipton's case and the cases referred to in the Judgment of Lord Reading clearly establish the proposition that when a Charter Party is entered into, which cannot be performed, when the time for performance arrives, if the ship which has to perform the Charter is requisitioned after the date of the Charter, by the Government of the State to which the ship belongs, in the absence of any provision in the Charter to the contrary, the Shipowner is not liable to the Charterers for not performing the Charter Party.

609

When the delay which is caused or is reasonably likely to be caused by the requisitioning of the chartered ship is such as will frustrate the commercial object of the Charter Party, such delay puts an end to the Charter Party. This proposition is clearly established by the decisions of the Court of Appeal in *The "Countess Warwick" v Le Nickel Societe Anonyme* and *The Anglo Northern Trading*

610

Respondents' Exhibits.

Company v Emlyn Jones & Williams 22, Commercial Cases, page 194, and the cases therein cited.

C. ROBERTSON DUNLOP

18th January 1918.

Respondents' Exhibit C. R. D. 2.

STATUTORY RULES AND ORDERS, 1914.
No. 1247.

611

DEFENCE OF THE REALM.

Transports and Auxiliaries.

PROCLAMATION, DATED AUGUST 3, 1914, AUTHORIZING THE LORDS COMMISSIONERS OF THE ADMIRALTY TO REQUISITION ANY BRITISH SHIP OR BRITISH VESSEL WITHIN THE BRITISH ISLES OR THE WATERS ADJACENT THERETO.

BY THE KING.

A Proclamation for Authorising the Lords Commissioners of the Admiralty to requisition any
612 British Ship or British Vessel within the British Isles or the Waters adjacent thereto.

George R.I.

Whereas a national emergency exists rendering it necessary to take steps for preserving and defending national interests:

And whereas the measures approved to be taken require the immediate employment of a large number of vessels for use as Transports and as Auxil-

aries for the convenience of the Fleet and for other similar services, but owing to the urgency of the need it is impossible to delay the employment of such vessels until the terms of engagement have been mutually agreed upon:

Now, therefore, We authorize and empower the Lords Commissioners of the Admiralty by warrant under the hand of their Secretary or under the hand of any Flag Officer of Our Royal Navy holding any appointment under the Admiralty to requisition and take up for Our service any British ship or British vessel as defined in the Merchant Shipping Act, 1894, within the British Isles, or the waters adjacent thereto, for such period of time as may be necessary on condition that the owners of all ships and vessels so requisitioned shall receive payment for their use, and for services rendered during their employment in the Government service, and compensation for loss or damage thereby occasioned, according to terms to be arranged as soon as possible after the said ship has been taken up, either by mutual agreement between the Lords Commissioners of the Admiralty and the owners or failing such agreement by the award of a Board of Arbitration to be constituted and appointed by Us for this purpose.

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Given at Our Court at Buckingham Palace, this Third day of August, in the year of Our Lord One thousand nine hundred and fourteen, and in the Fifth year of Our Reign.

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God save the King.

Respondents' Exhibit C. R. D. 3.*Defence of the Realm (Amendment),*

[5 GEO. 5.] No. 2, Act, 1915 [CH. 37.]

CHAPTER 37.

An Act to amend the Defence of the Realm Consolidation Act, 1914. [16th March 1915.]

Be it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1.—(1) Subsection (3) of section one of the Defence of the Realm Consolidation Act, 1914 (which gives power to take possession and use for the purpose of His Majesty's naval and military services certain factories or workshops or the plant thereof), shall apply to any factory or workshop of whatever sort, or the plant thereof; and that subsection shall be read as if the following paragraphs were added after paragraph (b):—

“(c) to require any work in any factory or workshop to be done in accordance with the directions of the Admiralty or Army Council, given with the object of making the factory or workshop, or the plant or labour therein, as useful as possible for the production of war material; and

“(d) to regulate or restrict the carrying on of work in any factory or workshop, or remove the plant therefrom, with a view to increasing the production of war material in other factories or workshops; and

Respondents' Exhibits.

"(c) to take possession of any unoccupied premises for the purpose of housing workmen employed in the production, storage, or transport of war material."

(2) It is hereby declared that where the fulfilment by any person of any contract is interfered with by the necessity on the part of himself or any other person of complying with any requirement, regulation, or restriction of the Admiralty or the Army Council under the Defence of the Realm Consolidation Act, 1914, or this Act, or any regulations made thereunder, that necessity is a good defence to any action or proceedings taken against that person in respect of the non-fulfilment of the contract so far as it is due to that interference.

(3) In this section the expression "war material" includes arms, ammunition, warlike stores and equipment, and everything required for or in connection with the production thereof.

2. This Act may be cited as the Defence of the Realm (Amendment), No. 2, Act, 1915.

Short title

Respondents' Exhibit C. R. D. 4.*Courts (Emergency Powers) Act, 1917.*

[7 & 8 GEO. 5.]

[CH. 25.]

CHAPTER 25.

D. 1917.

An Act to amend the Courts (Emergency Powers) Acts, 1914 to 1916, and the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, and to grant relief in connexion with the present war from liabilities and disqualifications arising out of certain contracts.

[10th July 1917.]

Be it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

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tracts.

1.—(1) Where, upon an application by any party to a contract for the construction of any building or work or for the supply of any materials for any building or work entered into before the fourth day of August, nineteen hundred and fourteen, the court is satisfied that, owing to the prevention or restriction of, or the delay in, the supply or delivery of materials, or the diversion or insufficiency of labour, occasioned by the present war, the contract cannot be enforced according to its terms without serious hardship, the court may, after considering all the circumstances of the case and the position of all the parties to the contract and any offer which may have been made by any party for a variation of the contract, suspend or annul the contract or stay any proceedings for the enforcement of the contract or any term thereof or any rights arising thereunder on such conditions (if any) as the court may think fit.

Respondents' Exhibits.

For the purpose of this subsection where an offer made before the fourth day of August nineteen hundred and fourteen was binding on a contracting party if accepted within a specified period expiring after that date and was so accepted after that date, the contract shall be deemed to have been entered into before that date.

(2) Where, upon an application by any party to any contract whatsoever, the court is satisfied that, owing to any restriction or direction imposed or given by or in pursuance of any enactment relating to the defence of the realm or any regulation made thereunder, or owing to the acquisition or user by or on behalf of the Crown for the purposes of the present war of any ship or other property, any term of the contract cannot be enforced without serious hardship, the court may, after considering the circumstances of the case and the position of the parties to the contract and any offer which may have been made by any party for the variation of the contract, suspend or annul the contract or stay any proceedings for the enforcement of the contract or any term thereof or any rights arising thereunder on such conditions (if any) as the court may think fit.

This subsection shall apply to any obligation relating to the supply of water, heat, light, traction or power arising under any Act of Parliament, or order having the force of an Act of Parliament, in like manner as it applies to a contract, except that it shall not be lawful for the court to annul any such obligation.

(3) This section shall be construed as one with the Courts (Emergency Powers) Act, 1914. 4 & 5 G

Respondents' Exhibits.

2. Where, by virtue of any contract of tenancy, any person is bound to do or abstain from doing or is under any liability if he abstains from doing or does any act or thing, and by virtue of any enactment relating to the defence of the realm or any regulation made thereunder the doing of such act or thing is wholly or partially restricted or ordered, he shall not, during the continuance of the contract or on or after the termination thereof, be liable to any mandatory order or any injunction or interdict in respect of such act or thing, or be liable to pay any sum of money or incur any forfeiture or other penalty in respect of the failure to do or the doing of such act or thing, if and in so far as the failure to do or the doing of such act or thing is attributable to compliance with such restriction or order as aforesaid:

Provided that the relief afforded by this provision from the obligation to do any such act or thing in consequence of such a restriction as aforesaid shall be subject to the following provisions:—

- (a) If the restriction is removed during the currency of the contract the obligation shall be fulfilled as soon as may be after the restriction is removed;
- (b) If the restriction has not been removed before the termination of the contract the person to whom the relief is given shall be liable to pay as damages a sum not exceeding the expenditure (if any) which would have been entailed by the fulfilment of the obligation.

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Respondents' Exhibits.

3. Where, before or after the passing of this Act, the non-fulfilment of any contract (not being a contract of tenancy) was or is due to the compliance on the part of any person with any requirement, regulation, order, or restriction of any Government department or of a competent naval or military authority made, issued, given, or imposed for purposes connected with the present war, or with any direction or advice issued or given by any Government department with the object of preventing transactions which, in the opinion of the department, would or might be contrary to national interests in connection with the present war, proof of that fact shall be a good defence to any action or proceeding in respect of the non-fulfilment of the contract. A certificate by the appropriate Government department shall be sufficient evidence that such direction or advice was issued or given and with such object as aforesaid.

Relief from
liability where
fulfilment of
contract interfered
with by action
of Government
department.

4.—(1) Subsection (2) of section one of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, shall not apply to a lease of a dwelling-house for a term of twenty-one years or upwards.

Power to add
premiums on
leases for 21
or upwards.
6 & 7 Geo. 5.

(2) Section two of the Courts (Emergency Powers) (No. 2) Act, 1916, is hereby repealed.

5.—(1) Where any sum has, whether before or after the passing of this Act, been paid on account of any rent or mortgage interest, being a sum which by virtue of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, would have been irrecoverable by the landlord or mortgagee, the sum so paid shall at any time within six months after the date of payment, or, in the case of a payment made before the passing of this

Provision
sums made
irrecoverable
5 & 6 Geo. 5.

Respondents' Exhibits.

Act, within six months after the passing thereof, be recoverable from the landlord or mortgagee who received the payment or his legal personal representative by the tenant or mortgagor by whom it was paid, and may, without prejudice to any other method of recovery, be deducted by such tenant or mortgagor from any rent or interest payable within such six months by him to such landlord or mortgagee.

(2) If any person in any rent book or similar document makes an entry showing or purporting to show any tenant as being in arrear in respect of any sum which by virtue of the said Act is irrecoverable, or if, where any such entry has before the passing of this Act been made by or on behalf of any landlord, the landlord, on being requested by or on behalf of the tenant so to do, refuses or neglects to delete the entry, he shall on summary conviction be liable to a fine not exceeding ten pounds.

(3) This section shall be construed as one with the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915.

6. The provisions of section one, subsection (1) (a) of the Courts (Emergency Powers) Act, 1914, shall not apply to any judgment or order for recovery or payment of any sum of money or costs given or made in any action of tort, or in Scotland in any action of reparation founded on delinquency, whether before or after the commencement of this Act.

7. In subsection (6) of section two of the Increase of Rent and Mortgage Interest (War Re-

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Respondents' Exhibits.

strictions) Act, 1915, which relates to tenancies at less than rack rent, the word "standard" shall be omitted, and at the end of the subsection there shall be inserted the following words "and this Act shall apply in respect of such dwelling house as if no such tenancy existed or had ever existed."

8. The Courts (Emergency Powers) Act, 1914, shall have effect in favour of officers and men of His Majesty's Forces with the following modification (that is to say)—

Application of subsection (1) of section one of 4 & 5 Geo. 5. c. 24 to officers and soldiers.

Subsection (1) of section one shall apply to any sum of money due and payable in pursuance of a contract made before the officer or man has joined His Majesty's Forces.

9.—(1) Whereas by reason of the emergencies of the present war members of the Commons House of Parliament have sometimes been, or may hereafter be, required to supply property to, or to permit the use thereof by, a Government department for purposes connected with the present war, it is hereby declared that none of the provisions of the House of Commons (Disqualification) Act, 1782, or of the House of Commons (Disqualifications) Act, 1801, shall be construed so as to extend to a contract or agreement entered into during the present war as to the price or compensation to be paid for any property so requisitioned or taken or as to any other terms on which any property so requisitioned or taken is to be handed over or supplied.

Relief from disqualification for members of House of Commons in certain cases.

22 Geo. 3. c. 24
41 Geo. 3. c. 24

(2) This section shall not affect any legal proceedings instituted before the twenty-first day of February, nineteen hundred and seventeen.

10. This Act may be cited as the Courts (Emergency Powers) Act, 1917.

Short title.

Respondents' Exhibit C. R. D. 5.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

Friday, Dec. 7, 1917.

COMPENSATION FOR REQUISITIONING SHIPS.

CROWN STEAMSHIP COMPANY, LTD. V. LORDS COMMISSIONERS OF THE ADMIRALTY.

Before Lord Justice SWINFEN EADY, Lord Justice WARRINGTON and Lord Justice SCRUTTON.

641 This was an appeal by the Admiralty Commissioners from a decision of the King's Bench Divisional Court, affirming Mr. Justice Sankey, who ordered the Admiralty Transport Arbitration Board to state a case upon the question whether the Admiralty were in law liable for damage to the steamship *Crown of Leon* while under requisition.

The judgment of the Divisional Court was reported in *Lloyd's List* on July 3, 1917.

The Solicitor-General (Sir Gordon Hewart, K.C.) and Mr. G. W. Ricketts (instructed by the Treasury Solicitor) appeared for the Lords Commissioners of the Admiralty; and Mr. C. T. Le Quesne (instructed by Messrs. Botterell & Roche) represented the respondents.

642 The SOLICITOR-GENERAL explained that the question of whether the Admiralty Transport Arbitration Board could be required to state a case depended on whether (1) there was a submission by them to arbitration, and (2) even if there were such a submission the Admiralty Transport Arbitration Board could be required to state a case, having regard to its constitution and rules.

By proclamation dated Aug. 3, 1914, the Lords Commissioners of the Admiralty were empowered

to requisition and take up for Our service any British ship or vessel as defined in the Merchant Shipping Act, 1894, within the British Isles or waters adjacent thereto for such period of time as may be necessary on condition that the owners of all ships and vessels so requisitioned shall receive payment for their use and for services rendered during their employment in Government service and compensation for loss or damage thereby occasioned according to terms arranged as soon as possible after the said ship has been taken up, either by mutual agreement between the Lords Commissioners of the Admiralty and the owners or failing such agreement by the award of a Board of Arbitration to be constituted and appointed by Us for this purpose.

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By the exercise of the prerogative of the Crown it was possible to requisition ships without payment, but this Proclamation announced that when requisition took place there should be payment.

LORD JUSTICE SWINFEN EADY: Commonly the ship was taken with her crew; in fact, the owners worked her with their crew.

THE SOLICITOR-GENERAL: No doubt when services of that kind are rendered they must be paid for.

LORD JUSTICE SWINFEN EADY: The judgment of MR. JUSTICE BRAY does cover that point. 645

THE SOLICITOR-GENERAL: In the sense of saying there is no prerogative to command services, yes. I was not thinking of that when I said the proclamation contained promise of payment which would otherwise not be made.

LORD JUSTICE SWINFEN EADY: It is one entire amount that has to be settled, including something

that might be commandeered and something that could not be.

The SOLICITOR-GENERAL: I do not think that particular question arises in this case. The effect of the proclamation is that these payments are either to be agreed or, in the absence of agreement, to be determined by this particular Board of Arbitration.

Lord Justice SCRUTTON: It did not seem to me to contemplate that the ship should go on running; and when a loss occurred, that then the compensation should be determined.

The SOLICITOR-GENERAL said the constitution of the Board was fixed by proclamation dated Aug. 31, and under Rule 6 the President might direct that any claim to arbitration should be heard by a tribunal consisting of the President and Vice-President sitting with Arbitrators from the panel selected by the President.

And that such award of any two arbitrators of such tribunal shall be conclusive and not subject to appeal or review.

The purpose of the rules was to make this tribunal, composed as it was of men with special qualifications, a tribunal whose findings should not be open to the ordinary kind of appeal or review.

Lord Justice SWINFEN EADY: That proclamation was addressed to a state of affairs in which it was intended by Government to take up ships for national service, and where these ships were to be worked by owners and their crews, the owners perhaps finding stores and provisions for the crew, the Admiralty finding coal; marine insurance for owners' account; war risk for the account of the Admiralty—terms of that kind which can only be arrived at by arrangement, what jurisdiction would

there be in the Crown by its prerogative to determine the rules by which that was to be settled?

The SOLICITOR-GENERAL: So far as the subject-matter that your Lordship has mentioned includes elements of service, &c., which are not within the prerogative of the Crown, one sees the difficulty.

Lord Justice SWINFEN EADY: These are the matters which this Board of Arbitration has to deal with.

The SOLICITOR-GENERAL: The most familiar topic before that Board is as to hire.

Lord Justice SCRUTTON: Hire and what hire covers.

Lord Justice SWINFEN EADY: When the Crown simply takes the ship there is an end of the matter. But when it is a question of the ship being sailed and stores provided by the owners, and the owners' crew being employed, and the details of the way in which the ship is to be sailed, the question at once arises whether the subject may appeal.

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The SOLICITOR-GENERAL: So far as the mere use of the ship is concerned the Proclamation concedes something to the owners in saying they shall receive payment for that, and that matter goes to the Board of Arbitration.

Lord Justice SWINFEN EADY: Do you say "shall not be subject to appeal or review" prevents it being an arbitration under the Arbitration Act?

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The SOLICITOR-GENERAL: Yes, that was the intention.

Proceeding, the SOLICITOR-GENERAL submitted that an order to state a special case would *pro tanto* review the award.

Lord Justice SWINFEN EADY: Is this a case in which there was no charter and no agreement at all?

The SOLICITOR-GENERAL: Yes.

Lord Justice SWINFEN EADY: Who sailed her?

The SOLICITOR-GENERAL: I think the owners.

Lord Justice SWINFEN EADY: Who provided stores and paid the wages of the crew?

Mr. LE QUESNE: The owners.

Lord Justice SWINFEN EADY: If that is so, is it not outside the powers of requisition? Stating a special case is a very convenient way of dealing with this, and if a contrary view were to obtain it might open a much wider question. Is it worth while pressing this?

The SOLICITOR-GENERAL: Your Lordship has been good enough to give me a clear intimation of the view in your Lordship's mind; and if I may say so, without dwelling on the matter, after what has been said as to the terms of the proclamation I take the responsibility on myself of saying I will not proceed further with the appeal.

Mr. LE QUESNE: I ask your Lordship to give me my costs.

Lord Justice SWINFEN EADY: You do not raise any objection, Mr. Solicitor?

The SOLICITOR-GENERAL: No.

Lord Justice SWINFEN EADY: Then the respondents will have their costs of coming here.

Respondents' Exhibit H. E. R.

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KINGS'S BENCH DIVISION.**COMMERCIAL COURT.***Friday, Feb. 22, 1918.***MAIZE CONTRACT DISPUTE.****A. E. LAWRENCE & CO. V. ELIAS BUERGER & CO.****Before Mr. Justice ATKIN.**

Judgment was delivered in this case to-day.

The previous proceedings were reported in *Lloyd's List* on Monday, Feb. 18, 1918.

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Mr. D. C. Leck, K.C., and Mr. H. H. Joy (instructed by Messrs. W. and W. Stocken) appeared for Messrs. Elias Buerger & Co. (the sellers), the appellants; and Mr. R. A. Wright, K.C., and Mr. A. Neilson (instructed by Messrs. W. A. Crump & Son) appeared for Messrs. A. E. Lawrence & Co. (the buyers) the respondents.

The question raised was: What was the position of the sellers under a contract to sell Plate maize, contract made in November, 1916, relative to December-January shipment, in view of the fact that on Jan. 4, while there was yet ample time to carry out the contract, the Royal Commission on Wheat Supplies stepped in with a telegram sent to the Baltic Mercantile & Shipping Exchange and elsewhere, which it was contended prevented the carrying out of the contract?

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The matter went to arbitration, and there was an award stated on a special case.

The award determined that, subject to the opinion of the Court upon the case stated, that the sellers committed a breach of the contract, and that they should pay to the buyers the sum of £620 7s.

for the breach, and should also pay to the buyers their costs of the arbitration.

The appellants contended there was an undoubted interference by the Royal Commission on Wheat Supplies with the fulfilment of the sellers' contract, therefore the finding of the arbitrators was wrong.

JUDGMENT.

659 Mr. Justice ATKIN, delivering judgment, said: This dispute comes before me on a case stated by arbitrators arising on a contract made in November, 1916, between the buyers and sellers for the purchase of 250 tons of yellow La Plata maize. The contract was a contract in the form of a London Corn Trades Association contract for La Plata grain. Under the terms of the contract, which were correctly stated in paragraph 3:—

660 The 250 tons of maize sold were to be shipped as per Bill or Bills of Lading, to be delivered during December, 1916, and/or January, 1917, and notice of appropriation with ship's name and approximate quantity loaded to be given by the shipper of the grain tendered under the contract to his buyer within 14 days from date of Bill of Lading, and by each other seller within the 14 days, or in due course if received by him after that time; should the shipper's notice be delayed beyond the 14 days through any cause beyond his control, it was to be given within 24 hours from arrival of documents in Europe, and passed on by each other seller to his buyer in due course on receipt.

The position of the seller in this case was that whereas he had a right to deliver the December or

January shipment, he had only covered himself for the December shipment. He had bought November and December shipments. As far as the December shipment is concerned, it has been found by the arbitrators, the latest shipment in December was made at such a date that the last day on which the seller could have performed his contract in respect of the December shipment was on Jan. 4, and he had made no tender on that day, and, therefore, as far as the December shipment was concerned that would have been a default. The case is not affected by the subsequent order, which one has to refer to, dated Jan. 4. In respect of the December shipment the case seems to be entirely covered by Mr. Justice Bailhache, in *Buerger v. Alexander*. But on Jan. 4 a fact occurred which has caused the difficulty in this case. That fact, as set out in paragraph 6 of the case, stated:—

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On Jan. 4, 1917, the Royal Commission on Wheat Supplies sent a telegram to the London Corn Trades Association in the following terms:—

The Food Controller has decided that the Royal Commission on Wheat Supplies shall control the importation of maize for sale in the United Kingdom. Please inform your members that all holdings of maize not yet arrived are taken over at to-day's closing c.i.f. price, and that present holders are free to act as agents of the Royal Commission for re-sale of their holdings on c.i.f. terms at prices fixed from time to time, receiving brokerage of 3d. per quarter. In order to avoid dislocation of trade, holders of maize arriving before further instructions are issued should sell such maize to consumers either c.i.f. to-day's prices as

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agents for the Royal Commission, or may at their own risk sell on credit or delivery terms, charging prices equivalent to c.i.f. prices, with addition for special facilities given and risk incurred. Maize arriving which cannot be sold at the price fixed must be landed for account of the Royal Commission. All holders of maize to arrive are required to furnish the Royal Commission on or before January with full particulars of their holdings—The Wheat Commission, London.

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Thereupon that Order, if it is to be properly called an Order—that telegram was supplemented by another telegram from the Royal Commission, dated Jan. 5, as follows:—

The telegram sent by the Commission yesterday does not apply to holdings of maize already purchased for the United Kingdom on ex ship or delivery terms. The term consumer includes distributing merchant. No dealings in maize options are permitted, except by license of the Commission, to whom all outstanding commitments must be submitted.

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Whether the Royal Commission on Wheat Supplies had ever seen the London Corn Trade Association form of contract for foreign shipments I am sure I do not know, but if they did they certainly made it a little difficult to construe that telegram by using the word holder. But it does not seem to me to be material in this case to decide what is meant by holder. I should have great difficulty in knowing what it meant, because it would appear to me it might possibly mean either the ultimate seller or the ultimate buyer, or the person

who at the time the telegram was issued was in fact in possession of the Bill of Lading, whether the person who at the time the telegram was delivered was in fact the last person who had received notice of appropriation, and it might mean all these or other things. However, that is a problem that I do not think I have got to solve.

The question that arises is whether by reason of that telegram sent by the Royal Commission on Wheat Supplies the seller is excused from performing his contract, because there is no question but that he did not in fact perform it, and it is put in two ways on his behalf. It was said first of all before the arbitrators that he was protected by the terms of the Defence of the Realm Amendment Act, 1915, Section 1, Sub-section 2, and, secondly, it is said that the effect of the telegram was to create a statutory prohibition of further completion of corn contracts, so that the performance became impossible by reason of the operation of the law. The first question I think that it is necessary to consider is the defence under the Defence of the Realm Amendment (No. 2) Act, 1915. That section (Sub-section 2) provides that:—

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It is hereby declared that where the fulfilment by any person of any contract is interfered with by the necessity on behalf of himself or any other person of complying with any requirement, regulation or restriction of the Admiralty or Army Council under the Defence of the Realm Consolidation Act, or this Act, or under any regulations made thereunder, that necessity is a good defence to any action or proceedings taken against that person in respect of non-fulfilment of the contract so far as it is due to that interference.

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That section in terms applies only to the Admiralty or Army Council, and the requirements, regulations or restrictions of the Admiralty or Army Council, and neither the Royal Commission on Wheat Supplies nor the Food Controller are the Admiralty or the Army Council. But it is said the provisions of the section have been extended to the Food Controller. Now that is a matter that will have to be examined. Assuming that it does apply to the Food Controller, the question arises as to whether or not in this case the sellers can be said to have had the fulfilment of the contract interfered with by the necessity on his part of complying with some requirement, regulation or restriction of the Controller, and that involves this, I think, that the requirement of Jan. 4 was a requirement which he was compelled to comply with.

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In order to determine that, one has to consider, I think, what is the position of the Food Controller. The Food Controller was appointed under the new Ministers and Secretaries Act, which was passed Dec. 22, 1916, and that provides that for the purpose of economising and maintaining the food supplies of the country during the present war it shall be lawful for his Majesty to appoint a Minister of Food, under the title of Food Controller, to hold office during his Majesty's pleasure. Section 4

672 said:—

It shall be the duty of the Food Controller to regulate the supply and consumption of food in such manner as he thinks best for maintaining a proper supply of food, and take such steps as he thinks best for encouraging the production of food. For these purposes he shall have such powers or duties of a Government Department or authority as his Majesty

may, by Order in Council, transfer to him or authorise him to exercise or perform concurrently with or in consultation with the Government Department or authority concerned, and also such further powers as may be conferred on him by regulations under the Defence of the Realm Consolidation Act, 1914, and regulations may be made under that Act accordingly.

There is a provision in Sec. 11, Sub-sec. 2, which provides for the issue of documents by the Ministry under that Act. It says:

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Every document purporting to be an Order or other instrument issued by a Minister appointed under this Act, and to be sealed with the seal of the Minister authenticated in manner provided by this section, shall be received in evidence, and be deemed to be such order or instrument without further proof unless the contrary is shown.

The position that existed at that time, therefore, was that the Food Controller had been appointed, but these two sections that I have read appear to give the Food Controller no compulsory powers at all. The provision for his powers are to be such powers as are transferred to him, or that he is to be authorised to exercise concurrently with other Departments, but the powers are to be given to him, either by Order in Council, or by Defence of the Realm Regulations, and the powers that were given to the Food Controller are to be found in Regulation 2 A. By the second clause of that regulation it is provided that the Food Controller may by Order require all or any of the persons owning

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or having power to sell or dispose of any article, to place such article at the disposal of the Controller on such terms as he may direct. It also, by sub-clause 3, provides that any Order under this regulation may be made either so as to apply generally, or so as to apply to any special locality, or so as to apply to the supply of any special article, or to any special producer, &c.

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So far as this case is concerned, I think the somewhat remarkable fact is that that regulation was not made until Jan. 10, six days after this telegram from the Royal Commission on Wheat Supplies; and, as far as I know, the Royal Commission have no compulsory powers of any sort or kind. None have been brought to my attention, nor can I find a trace of any such powers in any Statute I know of. I suppose, if there were compulsory powers in the Food Controller, that he might delegate the exercise of them to the Royal Commission on Wheat Supplies. I do not think it necessary to pronounce any decision on that. But, further, in the first place, the power given under the Defence of the Realm Regulation was not in existence on Jan. 4, when this telegram was issued, and, in the second place, the power given by the Defence of the Realm Regulation, if that were relied on to support the control of the maize after Jan. 10, is only a power

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to require persons to dispose of it by order, and in this case it appears to me that no order has ever been made by the Food Controller.

One is perfectly familiar with what is meant by an Order of a Department, and Section 11, Sub-Section 2, obviously contemplates such an Order. Here, to my mind, there has been nothing certainly produced, as far as one can see, in the nature of an Order dealing with maize. Orders have been made from time to time by the Food Controller. In fact

a very large number of Orders have been made, and the first one I know of is an order dealing with beans, peas, and pulse, made on May 16, and provides that persons who own or have power to sell or dispose of such articles shall place them at the disposal of the Food Controller. That is found at page 261 of the Defence of the Realm Manual, along with divers other orders relating to cereals, some of which are well known to his Majesty's subjects at the present moment. So far as maize is concerned, I know of no Order being made at all, and the telegram is a telegram which purports to be an instruction of the Royal Commission on Wheat Supplies.

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In these circumstances, it appears to me impossible to say that there was any necessity on the part of the seller of the wheat here, within the terms of the Section, to comply with any requirement, regulation or restriction, whether you consider the telegram to be a requirement, regulation, or restriction, of the Food Controller, or consider it to be a requirement, regulation or restriction of the Royal Commission on Wheat Supplies, and that, I think, would dispose of the defence under the Defence of the Realm Amendment Act.

But there is a further difficulty that arises in respect of this defence and it is this: As I have pointed out, the section itself only applies to requirements, regulations, or restrictions of the Admiralty or Army Council, and that is a protection given by Statute. There has been no Statute conferring a similar protection in respect of the requirements, regulations, or restrictions of the Food Controller. But what has been done was this, that an Order in Council was made, dated Feb. 6, 1917, in these terms:

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Whereas, under Section 4 of the New Ministries Act, 1916, it is provided, among other things that the Food Controller appointed under that Act is to have such powers or duties of any Government Department or Authority, whether conferred by Statute or otherwise, as His Majesty may, by Order in Council, transfer to him authorising him to exercise or perform concurrently with or in consultation with the Government Department or Authority concerned.

683

Now, therefore, it is hereby ordered as follows, first for the purpose of giving the Food Controller concurrent powers under Sub-section 2, Section 1, of the Defence of the Realm Amendment (No. 2) Act, that that enactment shall be read as if the Food Controller were specified therein in addition to the Admiralty or Army Council.

684

I find it extremely difficult to see that Sub-section 2 of Section 1 of the Act confers any powers upon the Admiralty or Army Council. So far from giving them power, it seems to me it is merely a protection of the individual against the exercise by the Admiralty or the Army Council of their powers, and the protection does not appear to me to add one whit to the powers that were possessed before that Section was passed. So in the same way it seems to me impossible to say that a Section which gives protection to an individual who complies with an order or requirement of the Food Controller can be said in any way to add to the powers of the Food Controller.

Supposing this Order in Council had been passed before Jan. 10, before the Defence of the Realm Regulation I have read. What possible powers of

the Food Controller could have been said to exist in pursuance of this Section as transferred to him under the Order in Council? Therefore, though it is not necessary, I think, in view of the conclusion that I have come to as to the powers actually possessed at that time, to come to a definite conclusion about it, I have the gravest doubt as to whether that Order in Council had any validity whatever by way of giving any protection against an act or requirement of the Food Controller.

Therefore, it appears to me, for the reasons I have given, that the seller in this case cannot avail himself of the defence under the Defence of the Realm Amendment Act. But that Act, in fact, no longer controls the acts of the executive, and the protection given to the public when they comply with the acts of the executive, because it was extended very largely by the Courts (Emergency Powers) Act, 1917, by Section 3. That act was passed in July, 1917, at a period, I think I am right in saying, intervening between the hearing of this case by the arbitrators and their final award.

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That Act provides that—

Where before or after the passing of this Act the non-fulfilment of any contract (not being a contract of tenancy) was or is due to the compliance on the part of any person with any requirement, regulation, order or restriction of any Government Department, or of a competent Naval or Military Authority, made, issued, given or imposed for purposes connected with the present war, or with any direction or advice issued or given by any Government Department with the object of preventing transactions which in the opinion of the Depart-

687

ment, would or might be contrary to national interests in connection with the present war, proof of the fact shall be a good defence to any action or proceeding in respect of the non-fulfilment of the contract. A certificate by the appropriate Government Department shall be sufficient evidence that such direction or advice was issued or given, and with such object as aforesaid.

That seems to me to have, as I had occasion to say in another case yesterday, a very wide operation. I think it is plain that non-fulfilment due to compliance on the part of any person means where the person is sued by another person. That is only following out the effect of the previous sections of the Defence of the Realm Act, and the word compliance is carefully chosen, and the idea of the necessity of complying with, as in the previous Act, is deliberately excluded. So that it is now no longer necessary to show that it was necessary to comply with an order. That appears because of the use of the words "direction or advice."

In these circumstances, I am inclined to think there would be protection, even though the Government Department in question had no legal authority, in fact, for issuing this requirement, regulation or restriction. I do not think it necessary to go so far as to decide that matter in this particular case, because it appears to me, at present, that, in spite of what I have said on the first head, the order given by the Royal Commission on Wheat Supplies apparently at the request of the Food Controller, would be a sufficient requirement of a Government Department or direction or advice of a Government Department within the terms of that Section 3.

Therefore, it appears to me that, if the seller can bring himself within the terms of that Section, he would be protected. Whether that point was raised or not is not clear, but I think it is reasonably clear from what I was told—that the point of this section was not, in fact, put before the arbitrators, though the Act of Parliament had been passed before they gave their award. Nevertheless, I think if it had been necessary I should probably have remitted the case to the arbitrators to consider the matter, because I do not think that in a case of this kind the decision ought to turn upon the mere fact that an Act of Parliament in fact in operation had not been brought to the attention of the arbitrators. Therefore, one must consider, I think, the bearing of this Section on the case.

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Now, in order to deal with that matter, one has to consider what the facts are as found by the arbitrators, and, as I understand, what the arbitrators have found is, that the non-fulfilment of the contract was not due to the Order of the Wheat Commission. They say, in Clause 7 of their award:

The Order of the Food Controller of Jan. 4, 1917, created a position which rendered the performance of the contract by the sellers very difficult, but we are not satisfied that such difficulty made the performance of the contract impossible, or that its fulfilment was interfered with, or its non-fulfilment was due to the necessity for complying with such Order within the Defence of the Realm (Amendment) (No. 2) Act, 1915. Section one (2).

693

I have come to the conclusion that this non-fulfilment of the contract was not due to the necessity of complying with this order. Two sets of facts have been brought up. The first, whether it could

be said, merely because there was a requisition, that the requisition prevented the performance of this contract by the sellers; that is one possible view. The other possible view is that, in the absence of the requisition, the sellers could have fulfilled their contract, but, on the other hand, under the requisition they could have obtained the goods, and so they were not prevented by the requisition. But, whichever view is intended to be found, it would, of course, be fatal to the sellers' case, and it appears to me that it is a question of fact, and, on a finding of fact, this Court cannot interfere. The parties have chosen their own tribunal on a question of fact; they have appealed unto Cæsar, and they must be bound by Cæsar's decision, and there is no ultimate Court of Appeal on a question of fact.

695

Therefore, although very cogent arguments were addressed to me, suggesting that the findings of fact is difficult to explain, arguments to which I have been disposed to give a certain amount of assent, yet it cannot be said, I think, that on the materials before me there was no evidence upon which the tribunal could have found these facts. There is no doubt that they were in the possession of information dealing with this class of business, and their view on a question of fact, unless it is shown there was no evidence to support it, must prevail. Therefore it appears to me that the arbitrators have found a set of facts which would prevent the sellers from having the protection of this Section 3 of the Courts (Emergency Powers) Act, 1917, and, of course, *a fortiori*, assuming that they were in any way entitled to the protection of the Defence of the Realm (Amendment) Act, the finding of fact would equally dispose of the protection under that Section. That being so, it appears to me the defence

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founded on these protecting Sections fails, and, in view of what I have said, it appears to me to be unnecessary to further discuss the suggestion that the contract became impossible because it became illegal to perform it.

In my view, there has been at no time a valid Order by the Food Controller in the sense that it was compulsory upon persons to whom it was addressed to comply with it. One feels a difficulty in seeing how, if there was a valid Order, the contract could legally be performed. It would be necessary, no doubt, to define the meaning of holder, but if holder means Bill of Lading holder it is difficult to see how the contracts contemplated in this class of business could be completed, and how the appropriations they are contemplating could be carried out.

For the reasons I have given, it appears to me there was no illegality, the question of illegality cannot arise, and the result is that the sellers have no defence on the findings of the tribunal, and the award must stand, and the sellers must pay the costs of the hearing.

700

Opinion.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

TEXAS COMPANY

vs.

HOGARTH SHIPPING COMPANY,
LTD., and HUGH HOGARTH &
SONS.

Adm. 59—197.

701

MEMORANDUM.

Reflection on this very interesting case, has led to the belief that it very fairly presents a question not peculiar to the admiralty, nor logically depending for existence on a state of war,—although war presents the problem in an acute way, and one attracting more general attention than is commonly given to the events of peace.

That question is, was the performance of the contract for the breach of which this action is brought,—prevented by the impossibility of performing it,—within the modern meaning of that phrase.

702 Much discussion has been had concerning the efficacy of the certificate of the British Ambassador,—I do not now think it necessary to place judgment on any resolution of that query, and by some findings of fact will now show why,—and also reduce the case to the query of legal impossibility, by which phrase I mean an impossibility recognized by law as dissolving a contract.

The parties executed a charter party, containing no "restraint of Princes" clause,—and (as I con-

strue the document) no other clause or rider thereof authorized either party to invoke the line of decisions construing and enforcing that phrase.

The charter named no special ship as the subject of hire for the voyage agreed upon; that was the only matter therein left open, but the moment the ship owners named the *Baron Ogilvy* as the vessel to perform that agreement, the charter became an ordinary voyage charter for that vessel and none other. She was for all legal purposes the ship and the only ship that would perform that particular agreement.

Whether there was what libellants call a "valid requisition" by the British Crown or not, is immaterial, in the sense that the point is not controlling. If I accept the certificate of the Ambassador, of course there was,—but I avoid without decision that question, now before higher authority in the *Glenedin*,—and hold on the evidence that the British government took and used the *Baron Ogilvy*, at and during the very time when the respondents had agreed to devote her to libellant's service, and further that such use was *in invitum*, except in the sense that all British ship owners were I presume patriotically willing to have their vessels used for warlike purposes,—if and when no other man's ship was available.

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In point of fact respondents did not cause or contribute to the taking over by Government of the *Ogilvy*, probably it was no great surprise, but libellant was equally aware at and after charter date of the possibility of requisition.

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As matter of law, respondents were not bound to use effort to prevent requisition, *i. e.*, to shift the burden to some other ship owners' shoulders in the interest of either themselves or libellants; and it was entirely within their right to seek (when gov-

ernmental rise was certain) the carriage of mules instead of something else, if mules promised less loss than other probable freight. This they did—nothing more.

Finally, respondents were under no legal obligation to substitute another vessel for the *Ogilvy*, any more than they were bound to make a new charter with libellants. Legally the two propositions are identical.

Thus the question for decision comes to this,—if the means and the only means whereby an American contract can be performed, is taken away by a foreign government, so that performance becomes physically impossible, is the contract dissolved,—so that losses or damages resulting from non-performance lie where they fell in the first instance.

This is a large query,—but some of the elements stated are still immaterial or irrelevant. The fact that the interfering action was governmental and foreign, has been the groundwork or moving cause of libellant's action. That is, reliance is placed on decisions holding that foreign governmental *vis major* preventing performance does not excuse. No decision binding on this court goes so far as to state the rule as above argued for. Whether the English cases touching on the matter can be reconciled, I more than doubt, but am not much concerned with: but neither *Liverpool &c. Co. v. Phenix*, 129 U. S., 397, nor *The Ada*, 250 F. R., 400, decided more than that one who in this country made a lawful contract, not in accord with the law of his own country, could not plead the foreign law to prevent his paying damages.

That is a very different thing from destroying (in a very real sense) the subject-matter of agreement. If it be true, as I believe it to be, that for the purposes of this suit, the *Ogilvy* was or became non-

existent, then the governmental element becomes as unimportant as the foreign, also the absence of the "restraint" clause, and the question is really reduced to its lowest terms; viz.: whether the facts present a case of that "impossibility of performance" which is and long has been a recognized and growing reason for dissolving a contract.

That "ordinarily" impossibility is no defence has been said often enough. It was a common law rule, and is consonant with the often referred to "unmorality" of our immemorial custom. For lawyers purposes it practically rests on *Paradine v. Jayne*, Aleyn, 26,—for a modern application in *Rowe v. Peabody*, 207 Mass., 226.

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But the defence is equitable, at least in a broad sense, and as equitable defences have made their way at law, so the doctrine of impossibility has advanced.

Wars, and the demands and destructions of war, do not change the law in one sense, but in another they do, by multiplying and enforcing circumstances showing the need of change,—of modernization.

Without war, there had come to be recognized (*inter alia*) two well known grounds of dissolution by impossibility,—destruction of subject-matter without any one's fault, and failure of contemplated means of performance. Under these heads the Great War has only furnished innumerable instances and applications. I think this litigation is one of them.

711

For tracing through multiplied decisions, and attempting to recognize and display the dominant lines of argument, I have no time—nor is that sort of thing useful in a court of first instance.

Respondent's brief consists frankly in Mr. Mackinnon's pamphlet "Effect of War on Contract";

with its reasoning I agree,—though (as above indicated) it seems to me more philosophical to regard the matter as a growth of equity,—humanizing the common law.

In admiralty we may recognize and enforce equitable principles without the strain that is often amusingly evident on the law side.

The matter is one that has attracted comment for years in legal periodicals; reference to the volumes of *The Harvard Law Review* below noted* will give a key to the modern American cases.

713 Of destruction of subject-matter *Martin Emmerich & Co. v. Siegel*, 237 Ill., 610, is a good example, and of failure of contemplated means *Clarksville &c. Co. v. Harriman*, 68 N. H., 374.

The phrase “frustration of venture” has obtained much vogue of late, and *The Allan Wilde* (U. S. S. C., Jan. 13, 1918), will increase it. To me it seems only an equivalent for and no improvement on, “impossibility of performance,” using impossibility in the practical sense so well illustrated by Maule, *J.*, when he pointed out that a shilling *might* be retrieved from deep water, yet legally it was “impossible” to do it,—because no sensible man would attempt the foolish job.

Libel dismissed, with costs.

714 Feb. 3, 1919.

C. M. HOUGH,
U. S. C. J.

Endorsed: Opinion.
Filed Feb. 3, 1919.

* Vols. 14, p. 464; 15, pp. 63 and 418; 19, p. 462, and 12, p. 501.

Final Decree.

715

At a Stated Term of the United States District Court for the Southern District of New York, held at the Court Rooms, in the Post Office Building, in the Borough of Manhattan, City of New York, on the 21 day of February, 1919.

Present :

HON. CHARLES M. HOUGH,
Circuit Judge.

<p>THE TEXAS COMPANY, Libelant, against HOGARTH SHIPPING CO., LTD., owner of steamship <i>Baron Ogilvy</i>, and HUGH HOGARTH & SONS, Respondents.</p>	}	Final Decree.
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716

The above-entitled cause having come on to be heard on the pleadings and proofs adduced by the respective parties, and the British Embassy having intervened by counsel as *amici curiae*, and through leave of Court having filed a certificate and suggestion herein, avowing the requisition of said steamship *Baron Ogilvy* by the British Government, as a governmental act of said Government, and the cause having been fully argued by counsel for the respective parties and the certificate and suggestion of the British Embassy having been supported by arguments of its counsel, and due deliberation hav-

717

ing been had and the Court having rendered and filed its decision in writing in favor of the respondents, directing that the libel herein be dismissed, with costs, and the costs of the respondents having been duly taxed in the sum of \$515.02.

Now, on motion of Kirlin, Woolsey & Hickox, proctors for the respondents, it is hereby

ORDERED, ADJUDGED AND DECREED

1. That the libel herein be and it hereby is dismissed on the merits, with costs to the respondents as against the libelant, and

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2. That the respondents Hogarth Shipping Company, Ltd., and Hugh Hogarth & Sons have, receive and recover of and from the libelant, The Texas Company, and its stipulators for costs, the sum of \$515.02, the costs of said respondents as taxed herein, with interest thereon until paid; and it is further

ORDERED that unless this decree shall be satisfied or proceedings thereon be stayed by appeal within ten days after service of notice of the entry thereof upon the libelant or its proctors, the stipulators for costs on behalf of the libelant shall cause their stipulations to be performed or show cause within four days thereafter, or on the first day of jurisdiction afterwards, why execution should not issue against them, their goods, chattels and lands to satisfy this decree.

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C. M. HOUGH,
C. J.

Endorsed: Final Decree: filed Feb. 21, 1919.

Notice of Appeal.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE TEXAS COMPANY,
Libelant,

against

HOGARTH SHIPPING COMPANY, } 59—197.
LTD., owner of the steamship
Baron Ogilvy, and HUGH
HOGARTH & SONS, }
Respondents.

722

Sirs:

PLEASE TAKE NOTICE that the libelant herein, The Texas Company, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the final decree entered in this action in the office of the clerk of the above-entitled court on or about the 21st day of February, 1919, and from each and every part of said decree.

723

Dated, New York, July 11th, 1919.

HAIGHT, SANDFORD & SMITH,
Proctors for Libelant-Appellant,
27 William Street,
Borough of Manhattan,
City of New York.

To:

ALEXANDER GILCHRIST, Esq.,
Clerk of the United States District
Court for the Southern District of New York.

KIRLIN, WOOLSEY & HICKOX, Esqs.,
Proctors for Respondents,
27 William Street,
Borough of Manhattan,
New York City.

725 FREDERIC R. COUDERT, Esq.,
HOWARD THAYER KINGSBURY, Esq.,
Amici Curiae, Counsel for the British Embassy,
2 Rector Street,
Borough of Manhattan,
New York City.

Endorsed: Notice of Appeal: filed July 11, 1919.

Assignment of Errors.

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UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

<hr/> <p>THE TEXAS COMPANY, Libelant,</p> <p>against</p> <p>HOGARTH SHIPPING CO., LTD., owner of <i>S. S. Baron Ogilvy</i>, and HUGH HOGARTH & SONS, Respondents.</p> <hr/>	<p>Assignment of Errors.</p>
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728

The libelant-appellant, The Texas Company, hereby assigns error in the findings, decision and decree of the District Court herein as follows:

FIRST: The Court erred in finding that the question whether there was a valid requisition of the steamship *Baron Ogilvy* by the British Crown or not was immaterial.

SECOND: The Court erred in failing to find that no valid requisition of the steamship *Baron Ogilvy* was made by the British Government.

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THIRD: The Court erred in failing to find that a taking of the steamship *Baron Ogilvy* by the British Government otherwise than by a valid requisition would not excuse respondent Hogarth Shipping Company, Ltd., from performing the charter with the libelant.

FOURTH: The Court erred in finding on the evidence that the British Government took and used

the steamship *Baron Ogilvy*, in invitum, at and during the very time when the respondent Hogarth Shipping Company, Ltd., had agreed to devote her to libellant's service.

FIFTH: The Court erred in finding that the respondent Hogarth Shipping Company, Ltd., did not cause or contribute to the taking over by the British Government of the steamship *Baron Ogilvy*.

SIXTH: The Court erred in finding that the respondent Hogarth Shipping Company, Ltd., was not bound to use effort to prevent requisition.

SEVENTH: The Court erred in failing to find that the respondent Hogarth Shipping Company, Ltd., should have made effort to obtain release of the steamship *Baron Ogilvy* from her use by the British Government.

EIGHTH: The Court erred in finding that it was entirely within the rights of the respondent Hogarth Shipping Company, Ltd., to seek a charter for the carriage of mules if such charter promised less loss to the respondent than other probable freight.

NINTH: The Court erred in failing to find that the respondent Hogarth Shipping Company, Ltd., should have used effort to bring about the shortest possible period of requisition or "talking" to the end that the steamship *Baron Ogilvy* might be tendered to the libellant on or before May 15, 1915, or otherwise in accordance with the charter with the libellant.

TENTH: The Court erred in failing to find that it was the voluntary modification of the situation

brought about by the offer of the respondent Hogarth Shipping Company, Ltd., or its agents, to the British Government of the mule charter, that prevented the performance of the charter with the libellant.

ELEVENTH: The Court erred in failing to find that the respondent Hogarth Shipping Company, Ltd., should have tendered the steamship *Baron Ogilvy* to the libellant at the expiration of the period of requisition or "taking."

TWELFTH: The Court erred in finding that upon the naming of the steamship *Baron Ogilvy*, the charter became an ordinary voyage charter for that vessel, and none other, and that she was for all legal purposes the ship, and the only ship that would perform the charter.

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THIRTEENTH: The Court erred in finding that respondent Hogarth Shipping Company, Ltd., was under no legal obligation to substitute another vessel for the steamship *Baron Ogilvy* upon her requisition or "taking" by the British Government.

FOURTEENTH: The Court erred in failing to find that respondent Hogarth Shipping Company, Ltd., was under a legal obligation to nominate and declare another vessel in place of the steamship *Baron Ogilvy* upon her requisition or "taking" by the British Government.

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FIFTEENTH: The Court erred in failing to find that the requisition or "taking" of the steamship *Baron Ogilvy* was acquiesced in by the respondent Hogarth Shipping Company, Ltd., or its agents, and no appropriate effort was made to perform the charter with the libellant.

SIXTEENTH: The Court erred in finding that the absence of a Restraint of Princes clause in the charter was immaterial.

SEVENTEENTH: The Court erred in failing to find that in the absence of a Restraint of Princes clause in the charter no governmental act or restraint by Great Britain would relieve respondent Hogarth Shipping Company, Ltd., from its charter with the libellant.

EIGHTEENTH: The Court erred in finding that in the absence of a Restraint of Princes clause in the charter the taking of the steamship *Baron Ogilvy* by the British Government in the manner shown by the evidence excused the respondent Hogarth Shipping Company, Ltd., from performing the charter with the libellant.

NINETEENTH: The Court erred in finding that an interfering action which was governmental and foreign relieved the respondent Hogarth Shipping Company, Ltd., from its American contract with an American citizen.

TWENTIETH: The Court erred in finding that the fact that the interfering action was governmental was immaterial.

TWENTY-FIRST: The Court erred in finding that the fact that the interfering action was foreign was immaterial.

TWENTY-SECOND: The Court erred in failing to find that the interfering action by the British Government was foreign.

TWENTY-THIRD: The Court erred in failing to find that a contract created by United States law can be released only by United States law.

TWENTY-FOURTH: The Court erred in finding that for the purposes of this suit upon the requisition or "taking" of the steamship *Baron Ogilvy* by the British Government, that vessel became non-existent.

TWENTY-FIFTH: The Court erred in finding that the charter of the respondent Hogarth Shipping Company, Ltd., to the libelant became impossible of performance.

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TWENTY-SIXTH: The Court erred in finding that the charter of the respondent Hogarth Shipping Company, Ltd., with the libelant was rendered impossible of performance in such a sense as to dissolve the charter.

TWENTY-SEVENTH: The Court erred in finding that the taking of the steamship *Baron Ogilvy* by the British Government in the manner shown by the evidence excused respondent Hogarth Shipping Company, Ltd., from performing the charter with the libelant.

TWENTY-EIGHTH: The Court erred in allowing Frederic R. Coudert, Esq., and Howard Thayer Kingsbury, Esq., to intervene as *amici curiae*, and in receiving the suggestion presented by them on behalf of the British Embassy at Washington.

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TWENTY-NINTH: The Court erred in receiving in evidence the Certificate signed by Colville Barclay, British Charge d'Affaires, attached to the Suggestion aforementioned.

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Assignment of Errors.

THIRTIETH: The Court erred in entering a decree dismissing the libel as against the respondent Hogarth Shipping Company, Ltd.

THIRTY-FIRST: The Court erred in failing to enter a decree in favor of the libelant against the respondent Hogarth Shipping Company, Ltd.

Dated, New York, July 11th, 1919.

HAIGHT, SANDFORD & SMITH,
Proctors for Libelant-Appellant,
27 William Street,
New York City.

743

Endorsed: Assignment of Errors filed July 11,
1919.

744

Order re Exhibits.

745

**UNITED STATES CIRCUIT COURT OF
APPEALS****FOR THE SECOND CIRCUIT.**

THE TEXAS COMPANY,
Libelant-Appellant,
against

HOGARTH SHIPPING CO., LTD.,
Owner of the S/S *Baron
Ogilvy*, and HUGH HOGARTH
& SONS,
Respondents-Appellees.

Order.

746

Upon the annexed consent of the proctors for the respective parties, and upon motion of Haight, Sandford & Smith, proctors for the appellant herein, it is

ORDERED that upon the appeal to this court in the above-entitled cause libelant's Exhibit 1 be omitted from the printed transcript of record, and that the respondents' Exhibit C. R. D. 5 be omitted from the printed transcript of record, except the opinion on page 5 thereof in the case entitled "Crown Steamship Company Ltd. v. Lords Commissioners of the Admiralty"; and that respondents' Exhibit H. E. R. be omitted from the printed transcript of record, except the opinion on page 5 *et seq.* thereof in the case entitled "A. E. Lawrence & Co. v. Elias Buerger & Co.," and it is further

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Order re Exhibits.

ORDERED that three copies of all Exhibits which counsel intend to refer to on the argument be furnished to the court upon the argument.

Dated, New York, August 19, 1919.

H. G. WARD,
U. S. C. J.

KIRLIN, WOOLSEY & HICKOX,
Proctors for Respondents-Appellees.

HAIGHT, SANDFORD & SMITH,
Proctors for Libelant-Appellant.

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No objection,

FREDERIC R. COUDERT.
HOWARD THAYER KINGSBURY,
Amici Curiae.

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Stipulation.

751

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE TEXAS COMPANY,
Libelant,

against

HOGARTH SHIPPING CO., LTD.,
owner of *S. S. Baron Ogilvy*,
and HUGH HOGARTH & SONS,
Respondents.

752

IT IS HEREBY STIPULATED AND AGREED by and between the parties herein that the foregoing printed copy of the record on appeal is a true transcript of the record as agreed on by the parties herein, and may be certified by the Clerk of this Court and filed in the office of the Clerk of the Circuit Court of Appeals.

Dated, New York, *January 27th, 1920.*

HAIGHT, SANDFORD & SMITH,
Proctors for Libelant-Appellant.

KIRLIN, WOOLSEY & HICKOX,
Proctors for Respondents-Appellees. 753

Approved.

FREDERIC R. COUDERT,
HOWARD THAYER KINGSBURY,
Amici Curiae, Counsel for the
British Embassy.

754

Clerk's Certificate.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE TEXAS COMPANY,
Libelant,

against

HOGARTH SHIPPING CO., LTD.,
owner of *S. S. Baron Ogilvy*,
and HUGH HOGARTH & SONS,
Respondents.

755

I, ALEXANDER GILCHRIST, JR., Clerk of the United States District Court for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the District Court in the above-entitled cause as agreed on by the parties herein made up pursuant to Rule No. 4 in Admiralty of the United States Circuit Court of Appeals for the Second Circuit.

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IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereto affixed in the City of New York and the Southern District of New York, this *4th* day of *February* in the year *1904* of our Lord, one thousand nine hundred and ~~nine~~ *teenty*, and of the Independence of the United States, the one hundred and forty-fourth.

ALEXANDER GILCHRIST, JR.,

Clerk.

(Seal)

United States Circuit Court of Appeals for the Second Circuit.

THE TEXAS COMPANY, Libellant-Appellant,
against

HOGARTH SHIPPING COMPANY, LTD., Owner of the Steamship
Baron Ogilvy, and Hugh Hogarth & Sons, Respondents-Appel-
lees.

Before Ward, Rogers, and Manton, Circuit Judges.

Haight, Sandford & Smith, for Libellant-Appellant.

John W. Griffin, of Counsel.

Kirlin, Woolsey, Campbell, Hickox & Keating, for Appellees.

John M. Woolsey and Harrison Lillibridge, of Counsel.

Frederick R. Coudert and Howard Thayer Kingsbury, *Amici
Curiae*, Counsel for the British Embassy.

Per Curiam:

Decree affirmed.

At a Stated Term of the United States Circuit Court of Appeals in
and for the Second Circuit, Held at the Court Rooms, in the Post
Office Building, in the City of New York, on the 28th Day of
June, One Thousand Nine Hundred and Twenty.

Present: Hon. Henry G. Ward, Hon. Henry Wade Rogers, Hon.
Martin T. Manton, Circuit Judges.

TEXAS COMPANY. Libellant-Appellant,

v.

HOGARTH SHIPPING COMPANY, LTD., and HUGH HOGARTH & SONS,
Respondents-Appellees.

Appeal from the District Court of the United States for the Southern
District of New York.

This cause came on to be heard on the transcript of record from
the District Court of the United States, for the Southern District of
New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and
decreed that the decree of said District Court be and it hereby is
affirmed with costs.

H. G. W.

H. W. R.

It is further ordered that a Mandate issue to the said District Court
in accordance with this decree.

Endorsed: United States Circuit Court of Appeals, Second Circuit. Texas Co. v. Hogarth Shipping Co. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jun. 28, 1920. William Parkin, Clerk.

UNITED STATES OF AMERICA,

Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 256 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Texas Company, against Hogarth Shipping Company, Ltd., & ano, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 19th day of July in the year of our Lord One Thousand Nine Hundred and Twenty and of the Independence of the said United States the One Hundred and Forty-fifth.

[Seal of United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk.

UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which The Texas Company is appellant, and Hogarth Shipping Company, Limited, Owner of the Steamship Baron Ogilvy, and Hugh Hogarth & Sons are appellees, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-seventh day of October, in the year of our Lord one thousand nine hundred and twenty.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 27,912. Supreme Court of the United States, October Term, 1920. No. 555. The Texas Company vs. Hogarth Shipping Corporation, Owner, etc., et al. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 3, 1920. William Parkin, Clerk.

United States Circuit Court of Appeals for the Second Circuit.

THE TEXAS COMPANY, Libelant, Petitioner,
against

HOGARTH SHIPPING CORPORATION, LTD., Owner of the Steamship Baron Ogilvy, and HUGH HOGARTH & SONS, Respondents.

It is hereby stipulated and consented that the certified transcript of the record now on file in the office of the Clerk of the Supreme Court of the United States shall be taken as the return of the Clerk of the United States Circuit Court of Appeals for the Second Circuit to the writ of certiorari herein.

Dated at New York City, October 28th, 1920.

(Sgd.) HAIGHT, SANDFORD, SMITH &
GRIFFIN,

By JOHN W. GRIFFIN,
Proctors for Libelant, Petitioner.

(Sgd.) KIRLIN, WOOLSEY, CAMPBELL,
HICKOX & KEATING,

By JOHN W. WOOLSEY,
Proctors for Respondents.

[Endorsed:] U. S. Circuit Ct. of Appeals for the Second Circuit. The Texas Company, Libelant, Petitioner, against Hogarth Shipping Corp., Ltd., owner of the s/s Baron Ogilvy, and Hugh Hogarth & Sons, Respondents. Stipulation. Haight, Sandford, Smith & Griffin, Proctors for Libelant-Petitioner, 27 William Street, Borough of Manhattan, New York City.

To the Honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated New York, November 3, 1920.

[Seal of United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
*Clerk of the United States Circuit Court of
Appeals for the Second Circuit.*

[Endorsed:] 555/27,912. United States Circuit Court of Appeals, Second Circuit. Texas Company v. Hogarth Shipping Co. Return to Certiorari. 1.70.

[Endorsed:] File No. 27,912. Supreme Court U. S., October Term, 1920. Term No. 555. The Texas Company, petitioner, vs. Hogarth Shipping Corporation, Owner, etc., et al. Writ of certiorari and return. Filed Nov. 5, 1920.

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PETIT.

JOHN W.
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Office Supreme Court, U. S.
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JAMES D. MAHER,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 555

THE TEXAS COMPANY,

Libelant-Petitioner,

against

HOGARTH SHIPPING CORPORATION, LTD., owner of
the steamship *Baron Ogilvy*, and HUGH HOGARTH
& SONS,

Respondents.

**PETITION FOR WRIT OF CERTIORARI AND
BRIEF.**

HAIGHT, SANDFORD, SMITH & GRIFFIN,
Proctors for Petitioner.

JOHN W. GRIFFIN,
Counsel.



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**Notice of Petition for Writ of
Certiorari.**

Supreme Court of the United States

OCTOBER TERM, 1920.

THE TEXAS COMPANY, Libelant-Petitioner, against HOGARTH SHIPPING COMPANY, LTD., Owner of the Steamship <i>Baron Ogilvy</i> , and HUGH HO- GARTH & SONS, Respondents.	}	No. .
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Sirs:

Take notice that the annexed petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, in the above entitled cause, will be presented to the Supreme Court of the United States at the opening of Court on October 4, 1920.

Dated, New York, September 6, 1920.

Yours, etc.,

HAIGHT, SANDFORD, SMITH & GRIFFIN,
Proctors for Petitioner.

To:

MESSRS. KIRLIN, WOOLSEY, CAMPBELL,
HICKOX & KEATING,
Proctors for Respondents.

Petition for Writ of Certiorari.

SUPREME COURT
OF THE UNITED STATES,

OCTOBER TERM, 1920.

<p>THE TEXAS COMPANY, Libelant-Petitioner, against HOGARTH SHIPPING COMPANY, LTD., Owner of the Steamship <i>Baron Ogilvy</i>, and HUGH HO- GARTH & SONS, Respondents.</p>	<p>No. .</p>
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*To the Honorable the Chief Justice and Associate
Justices of the Supreme Court of the United
States:*

The petition of The Texas Company, a corpora-
tion duly organized and existing under the laws
of the State of Texas and a citizen of the United
States, in the above entitled cause respectfully al-
leges as follows:

I. This is a petition for a writ of *certiorari* to
review a final conclusion of the United States Cir-
cuit Court of Appeals for the Second Circuit, which
affirmed a decree of the United States District
Court for the Southern District of New York, dis-
missing the libel in an admiralty suit for breach
of charter.

II. The libel was based upon a rate charterparty executed in the City of New York on February 6, 1915, whereby one of the British steamships owned by the respondents (the particular vessel to be named later) was chartered by them to the petitioner for a voyage from Port Arthur, Texas, to a South African port with a full cargo of refined petroleum. Subsequently the steamship *Baron Ogilvy* was named. The respondents refused to perform the charterparty, and this suit was brought by the petitioner to recover its resulting damages.

The defense was, in substance, that the vessel had been prevented from performance by requisition of the British Government. The District Court upheld this defense and dismissed the libel. (Opinion, record, fols. 700-713; 265 Fed., 375). The Circuit Court of Appeals affirmed without opinion.

The charterparty is unusual in that it does not contain the clause common in shipping documents excepting restraints of princes, rulers and people. Since the contract was made while the war was in progress, this omission is especially worthy of notice. Not only did the charter omit this all but universal clause but it contained a special clause indicating that it was to be performed even though performance could not be rendered at the expected time. This clause reads as follows (fol. 456) :

"8. The lay days for loading are not to commence before April 15th, 1915, except with the consent of the Charterers or their Agents, and if the vessel is not ready to load by two o'clock P. M. on May 15th, 1915, the Charterers shall have the option of cancelling or maintaining this charter, their decision to be given at once,

if the vessel be then at the loading port; but, if the vessel has not then arrived, their decision need not be given until 24 hours after arrival."

Under this clause, if the vessel should not be able to go to the loading port at the time anticipated, still it was her duty to report there for loading even at a later time. The charterer was given the option to cancel in case of delay but was of course not obliged to do so.

This was, therefore, an American contract, made in New York, between an American citizen and British citizens; it omitted the usual exception of restraints of princes, and contained the clause referred to above, which indicated that the shipowners (the respondents) were to carry out their contract at any time, even later than the expected time, unless the charterer, upon tender of the vessel to load, should elect to cancel.

The answers of the respondents alleged that, on April 10, 1915, while at London, the *Baron Ogilvy* "was requisitioned by the Government of the Kingdom of Great Britain and Ireland for Government service, under and pursuant to the general prerogative of the British Crown and in pursuance of the Royal Proclamation, dated August 4, 1914" (fols. 29, 63). The answers further set forth that this alleged requisition constituted "a restraint of princes" (fols. 31, 64) and that by reason thereof the "charterparty became impossible of performance" (fols. 31, 65).

Certain other defenses were pleaded which were not sustained. These are dealt with in the petitioner's annexed brief, but it is not deemed necessary to discuss them in this petition.

The respondents' proof showed that the Royal Proclamation referred to in the answers purported to authorize the Lords Commissioners of the Admiralty

"by warrant under the hand of their Secretary or under the hand of any Flag officer of our Royal Navy holding any appointment under the Admiralty, to requisition and take up for Our Service any British ship, etc." (fols. 613, 614).

No such proceeding as this was ever had. The alleged requisition consisted solely of a telegram sent to the respondents on April 10, 1915, by Mr. Ernest J. Foley, an Assistant Director of Transports in the service of the British Admiralty. This telegram read as follows:

"Hogarth Glasgow SS *Baron Ogilvy* is requisitioned under Royal proclamation for Government service.

TRANSPORTS."

This telegram was all that was ever done by way of requisition. A correspondence took place between the Admiralty and the respondents, as a result of which an agreement was entered into whereby, in place of the alleged requisition, the respondents chartered the vessel to the British Government, at a freight higher than the requisition rate, for a series of four trans-Atlantic voyages. As soon as this was done, the respondents wholly repudiated the charter and notified the petitioner (on April 12, 1915) that they would not perform it *at all*.

The four trans-Atlantic voyages for which the respondents chartered the vessel to the British Government were expected to take, and did take, about six months; and, on their conclusion, the vessel was released from Government service. This was in October, 1915 (Foley, fol. 253; Hogarth, fol. 193). The vessel was never tendered to the petitioner for service under the charter (Hogarth, fols. 193, 19). It further appeared that one term of the agreement between the respondents and the British Government was that the Government agreed to protect and indemnify the respondents against such claims as the present (fol. 179).

The petitioner urged in the courts below (1) that the contract was an obligation created by American law and sought to be enforced in an American court, and that it was no defense to say that the law of some other country, still less the act of the executive of some other country, could dissolve the obligation; (2) that this was not a case of "frustration," so called, for the record contains no evidence that the alleged requisition would probably last for an inordinately long period, and there is evidence to the contrary; (3) that the shipowners could not, by their own act, charter the ship to the British Government for voyages certain to occupy six months and then claim that they were prevented from performance by a requisition of the British Government; (4) that the omission of a restraint of princes clause showed that such risks as that of requisition were to fall upon the shipowner and not upon the charterer, especially since the charter was made long after the outbreak of the war; and (5) that, where a charter contains no such clause, but is an absolute covenant to perform, a Court cannot relieve the shipowners from

their obligation, even if foreign law interposes a delay in or a prohibition of performance. It has been a settled rule of law for more than a century, both in England and in this country, that prevention by foreign law does not excuse failure to perform a contract.

All of these contentions were overruled. The District Court held that the British Government did take and use the vessel and that such use was *in invitum* (fol. 704) and extinguished the respondents' liability under their contract with the petitioner. The Court seemingly took the view that the alleged requisition had the same effect as the loss of the vessel, and that a "destruction of the subject-matter" of the contract ensued (fols. 408, 409). The Circuit Court of Appeals gave no reasons for its conclusion.

The petitioner further urged that the alleged requisition was not in fact a requisition at all under British law, and introduced the evidence of a British legal expert to that effect. It will be noted that the answers pleaded the Royal Proclamation; the telegram of requisition purported to act under the Royal Proclamation; and yet the mode of requisition prescribed by the Royal Proclamation was not even approximately followed.

III. With the apparent purpose of foreclosing any discussion of this subject, the British Embassy appeared as *amici curiae* and offered a suggestion and certificate, which were received in evidence over objection (fols. 92-100, 113). They are printed at folios 124-131 of the record. They allege that the *Baron Ogilvy* was requisitioned by the British Government and was operated under its orders from April 10, 1915, to October 20, 1915, and they

call upon the Court to decline jurisdiction. The Court very properly asserted its jurisdiction (fols. 91, 92). It finally declined to pass on the effect of the documents produced by the British Embassy (fol. 704). The Circuit Court of Appeals affirmed without opinion; but in certain other cases it has treated such certificates as controlling (see *Earn Line Steamship Company v. Sutherland Steamship Co., Ltd.*, 264 Fed., 276; *The Carlo Poma*, 259 Fed., 369; *Agency etc. Co. v. American etc. Co.*, 258 Fed., at 368. It is therefore fair to conclude that the Circuit Court of Appeals gave the same conclusive effect to the suggestion and certificate in the case at bar. The facts recited in the documents in question were obviously not within the personal knowledge of the official signing them; nor, of course, was there any opportunity for cross-examination. Tested by any ordinary rule of evidence, they were hopelessly incompetent. To find them not merely admitted, but treated as conclusive is, to say the least, startling.

IV. The foregoing recital of facts is necessarily greatly condensed. The facts are more fully stated and discussed below in the petitioner's brief. Enough has, however, been said to indicate that serious and far-reaching questions are presented. Among them are these:

1. Where a charterparty containing no restraints of princes clause is executed in the United States, and its enforcement is sought by an American citizen in an American court, is it a defense to say that that performance has been prevented by British law or by the British executive?

2. Where an American charterparty of a British vessel, executed during a war in which Great Britain is involved, contains no restraints of princes clause, is a real or alleged requisition by the British Government any defense to suit in an American court by an American citizen for refusal to perform the charter?

3. Can any act of the British executive dissolve the obligation of an American contract?

4. Is the real or alleged requisition of a chartered vessel by the British Government analogous to "destruction of the subject-matter" of the contract so that the contract is ended?

5. Where a real or alleged requisition takes place and there is no evidence that its effect will be to postpone inordinately the performance of an existing charter, can the shipowner claim that the charter is dissolved by the mere fact of requisition?

6. Can a shipowner who makes a voluntary freight agreement with a government at a higher rate and for a prolonged period, in lieu of a real or alleged requisition for a period not fixed, but not shown to be likely to be prolonged, rely upon the real or alleged requisition to avoid performance of a pre-existing charterparty?

7. Where the defense of requisition by a foreign government is interposed, can the Ambassador of that government, by filing such a suggestion and certificate as are in this record, prevent an American court, at the instance of an American citizen, from ascertaining whether there was in fact such a requisition; and, thus, by his mere *ipse dixit*, conclusively prove facts manifestly beyond his per-

sonal knowledge and preclude all inquiry into them on the part of the Court?

8. Can such an Ambassador thus conclusively establish the fact and validity of an alleged requisition without being subject either to cross-examination or to the hearsay rule, even though the record contains uncontradicted evidence that the vessel was operated, not under requisition, but under a voluntary charter to his government? In short, is the Court bound to accept such an ambassadorial assertion even though it knows from the record before it that the assertion in question is incorrect?

9. Should the Court receive such a certificate and suggestion as a direct communication from the diplomatic officer of a foreign government, or should it insist that such communications be transmitted through the Department of State or the Department of Justice?

The foregoing questions are of great importance and have not been settled by any court of last resort. There have been numerous foreign requisitions which have affected American charterparties and which are now the subject of litigation. In view of the widespread requisition of tonnage by foreign governments during the war, it is most desirable that the highest authority should speak with regard to the rights of the many American charterers whose contracts are claimed to have been thus terminated.

The decision in the case at bar involves the overturning of the well settled rule that prevention by foreign law is not an excuse. It is, as shown in the petitioner's annexed brief, a departure from the authorities both in this country and in England.

The attempted analogy to destruction of the subject-matter, on which it is based, is plainly false and as plainly involves begging the question.

In numerous cases recently such certificates and suggestions as are in this record have been offered by foreign diplomatic officials and have met with varying receptions from various courts (see Brief, pp. 60, 62-67 *infra*). Some courts have received them and have treated them as conclusive; some have denied the right of a foreign official thus to restrict their inquiry; others have insisted that any such communication must be transmitted through the Department of State or the Department of Justice (see Brief, p. 62 *infra*). It is highly desirable that this Court should settle the proper practice with regard to the reception or rejection of such documents and with regard to the proper channel for their transmission; and it is even more important that the effect of such documents, if received, should be authoritatively declared by this Court.

It is respectfully submitted that the questions involved are of importance sufficient to warrant the granting of a writ of *certiorari* herein.

Certain other less vital questions are also raised—such as the following:

If a charter is made of a vessel to be named, and the vessel subsequently named becomes unavailable by reason of requisition, does any duty rest upon the shipowner to substitute another vessel?

If a vessel which is under charter is requisitioned does not the owner owe the charterer a duty to make reasonable efforts to secure her release or, failing that, to substitute another vessel?

V. The petitioner presents herewith a certified copy of the transcript of record of all the proceedings in the District Court and in the Circuit Court of Appeals herein.

Wherefore the petitioner prays that this Honorable Court will cause the writ of *certiorari* to be issued and will require the said Circuit Court of Appeals for the Second Circuit to certify the whole record and cause to this Court for consideration, and that this Court will decide the matters in controversy as prayed by the petitioner.

And your petitioner will ever pray, etc.

THE TEXAS COMPANY,

By W. A. THOMPSON, JR.,

Vice-President.

I hereby certify that I have examined the foregoing petition and that in my judgment it is well founded and is entitled to the favorable consideration of the Court.

JOHN W. GRIFFIN,

Counsel.

BRIEF FOR PETITIONER.

The Facts.

As already stated, the charterparty, which is printed in the record at pages 150 to 158, was executed on February 6th, 1915, at New York. The vessel chartered was not named, but was described as

"a first-class steam vessel owned by Messrs. Hugh Hogarth & Sons of Glasgow and name of vessel to be declared on or before March 15th, 1915, classed 100-A-1 at British Lloyd's or its equivalent and to be so maintained during the service."

The *Baron Ogilvy* was named on March 11th.

As also pointed out above, the charter constituted an absolute contract to carry the cargo and contained no restraints of princes clause, still less any clause making it void in case of requisition. This is most significant since, at the time of its execution, the war had been in progress for eight months; numerous vessels had already been requisitioned by the British Government; and the possibility of requisition cannot have been absent from the contemplation of the parties. Moreover, it specifically appears that war conditions were in their minds from the insertion in the charter of certain special clauses having to do with war conditions (fols. 468-473). These provided in substance that the ship should have the right to obey any orders given by the British Government as to routes and other incidents of the voyage; should be employed only in trades lawful for a British ship; should not carry cargo which would expose her to seizure by the

Allies; and should not violate any of the warranties in her war risk policies, which warranties provided in effect that the instructions of the British Government should be followed as to routes, ports of call, time of starting, etc., and that the ship should not enter a blockaded port (fols. 470-472).

In order to make the narrative of facts chronological, there is here inserted a brief summary of the correspondence showing the facts as to the agreement finally made between the respondents and the Admiralty.

On March 31st the respondents received an intimation that the vessel might be requisitioned (fol. 498). On April 1st an inquiry was made on behalf of the Admiralty (fol. 502) by Hogg & Robinson, the Admiralty's agents (Hogarth, fol. 147), for vessels

"capable of carrying from about 4,000 to 6,000 tons, measurement, of hay."

The letter goes on to say:

"they will be required on this service *for some weeks* and as the next vessel is wanted to commence loading at Belfast on the 6th instant or as soon after as possible, we shall be obliged if you will kindly send us a wire, on receipt, for the information of the Admiralty authorities." (The italics in the above and in the following extracts from this correspondence are ours.)

On April 6th, the respondents replied that their only vessel of the type in question in or shortly due in England was the *Baron Ogilvy* (fol. 515).

On April 9th, Harley & Company, who were ship brokers, telegraphed to the respondents as follows:

"*Baron Ogilvy.* Referring to Admiralty notice requisition we believe could induce them take her *instead* for 3 or 4 trips New Orleans Avonmouth or Liverpool £14 namely £13.10.0, 10 shillings gratuity. Shall we try to do so?"

On the same date, Harley & Company wrote the respondents as follows (fols. 522-523) :

"With reference to notice of requisition by the Admiralty of this steamer, *we believe it would suit their purpose just as well if they were to charter her* for voyages from New Orleans to Avonmouth or Liverpool for Mules, at £13.10.0 and 10/. gratuity *for three or four trips and* we believe if you were to authorise us to approach them that we could arrange this matter.

The conditions of course would be the same that are obtaining in the case of your other steamers running under charter to the Admiralty for this mule business.

We await your views on the matter."

Also on April 9th, Messrs. Harley & Company addressed a letter to the Director of Transports reading as follows (fols. 532 to 534) :

"Baron Ogilvy.

Now London expected discharged Monday.

With reference to your verbal notice of requisitioning this steamer, we beg to say that *if it would suit your purpose equally well to charter her for four trips* from New Orleans to Avonmouth or Liverpool for the conveyance of Mules, that *owners would be agreeable* (you nevertheless remaining responsible for any third party claims as under requisition) to undertake that employment on being paid freight at the rate of £13.10. per head of mule put on board, plus 10./ gratuity on the number landed alive.

Owners undertake all the fittings, foddering, electric light, wireless telegraphy, to supply attendants etc. in the usual manner as they are doing in the case of the other 'Baron' steamers at present under your employment, and they would do their best to carry out this work to your satisfaction.

In the event of your agreeing to this proposal the steamer would fit up at New Orleans to carry as much mules as possible under the supervision of your Officer there.

If this suggestion meets your approval we shall be glad of an early reply owing to the prompt position of the steamer in order that owners may make the necessary arrangements."

It will be noted that this is distinctly put forward as a proposition of *voluntary charter in lieu of requisition*.

On April 10th, the telegram constituting the alleged requisition which is quoted above (p. 5) was sent to the respondents. On the same day Harley & Company wrote to the Director of Transports a letter proposing a charter for four trips New Orleans to Avonmouth or Liverpool, which was practically a copy of their letter of April 9th quoted above. It contained, however, the following postscript (fol. 551) :

"We estimate this steamer's position would be as under

1st	voyage	ready	New Orleans	about	16th May
2nd	"	"	"	"	about 30th June
3rd	"	"	"	"	about 15th August
4th	"	"	"	"	about 1st October."

It is therefore plain that this proposal was made with deliberate knowledge that it would be the end of October before the vessel could complete the four voyages.

This offer was accepted by the Director of Transports in a telegram dated April 10th and reading as follows:

"Your offer *Baron Ogilvy* four voyages conveyance of mules New Orleans to Avonmouth or Liverpool freight thirteen pounds ten shillings per head gratuity ten shillings each animal landed alive is accepted stop please say when and where ship can be inspected."

On April 12th the respondents wrote Harley & Company that they noted the acceptance of the proposed mule charter by the Admiralty and that they were accordingly proceeding to fit the vessel for the service. The formal letter of confirmation from the Director of Transports appears at folios 568 to 572. The material portion of it reads as follows:

"With reference to your letter of the 10th instant and in confirmation of my telegram of the same date, I beg to inform you that your tender of the S.S. *Baron Ogilvy* is accepted for the conveyance of 672 mules from New Orleans to Avonmouth or Liverpool for four voyages, the first homeward sailing to be about 16th May."

Hogarth, the respondents' manager, testified that the *Baron Ogilvy* was employed by the Government under "a special bargain" (fol. 177). One term of it, by the way, was that the Government undertook to indemnify the owners against claims on the vessel's commitments (fol. 179).

On the same day (April 12th) the respondents repudiated the petitioner's charter. This was done by a letter written to the petitioner by the respondents' agents in New York giving notice, not that

performance of the charter would be delayed, but that it would not be performed *at all*. The letter read as follows (fols. 102-103) :

"Baron Ogilvy. Referring to this steamer's charterparty, dated at New York February 6th, 1915, kindly be advised that we are this morning in receipt of the following cable from Glasgow :

'Baron Ogilvy requisitioned.'

This means that the steamer has been commandeered by the British Admiralty and will therefore not be able to carry out charterparty with you."

Hogarth testified (fol. 193) that he considered that he had "no liability to the Texas Company."

The charter being thus repudiated, the libellant proceeded to secure other tonnage (Answer to Second Interrogatory, fol. 104).

The terms thus secured for the mule trade were more favorable to the respondents than the regular requisition rate. The latter was 11 shillings per deadweight ton per month on a time charter basis (fol. 211). The respondents clearly expressed their preference for the freight payable for carrying mules (fols. 120, 557). This netted, according to Hogarth (fols. 211, 212), £100 to £200 a month more than the regular 11 shilling rate.

The carriage of the mules under the agreement thus reached with the Admiralty was evidently more profitable to the respondents than the petitioner's charter would have been. Under the petitioner's charter, the vessel would have carried 180,000 cases of oil (Hogarth, fol. 211), at the charter rate of 47 cents per case (fol. 452), thus earning \$80,600 in a period estimated by Hogarth (fol. 164) at three and one-half months — say \$23,000 gross per month. At the end of the voyage

the vessel would have been in the remote ports of South Africa. Under the mule charter, the vessel actually carried on her four voyages 804, 902, 903 and 904 mules respectively—a total of 3,513. This made a total freight, at £14 a head, of £49,182, or \$236,073.62, taking the exchange at \$4.80. The voyages occupied about seven months. The monthly earnings were therefore \$33,724.80; about \$10,500 per month or over \$310 per day in excess of the sums which would have been earned under the petitioner's charter. Also war risk was carried by the Government (fol. 214). While it is quite true that out of this the respondents paid for fittings, attendants and fodder, it seems perfectly clear that the net return far exceeded that under the petitioner's charter—to say nothing of the advantage of having the vessel in North Atlantic waters at the expiration of the service. Certainly the above figures show that Hogarth's testimony that he would have made "infinitely more" (fol. 164) under the petitioner's charter, and that he sustained "a very great loss" (fol. 212) in the Admiralty's service is wholly incorrect.

It is also plain that the petitioner's charter was below the market, since on April 14th it cost the petitioner 66 cents per case to secure other tonnage (fol. 445), as against the rate of 47 cents in the *Baron Ogilvy's* charter. Altogether, it is clear that the petitioner's charter could have had few attractions for the respondents.

Five things appear from the foregoing testimony and correspondence: (1) The vessel was employed, not technically under requisition, but under a voluntary charter. (2) Her freight rate with the Admiralty was in excess of the usual requisition

rate and in excess of the petitioner's charter rate. (3) The only intimation as to the probable length of the service under requisition is that contained in the letter of April 1st, 1915, quoted above, in which the Admiralty's representatives state that vessels were desired to carry hay "*for some weeks*" and to load at Belfast April 6th or shortly after. (4) The vessel's cancelling date was still five weeks off. (5) The respondents at their own instance made a charter which they *knew* was going to last at least until the end of October, thereby making it certain that the vessel, instead of being released at the end of "some weeks" (which might mean three or four weeks), was going to be retained for at least six and one-half months. Having thus deliberately made an arrangement which irrevocably tied up their vessel for six or seven months (but which had the advantage of giving them better freights), they informed the petitioner that they were not going to perform the charter sued on. This information was given by letter dated New York, April 12th, and was presumably based on a cable sent from London on the 11th, the very day after the charter to the Admiralty had been concluded.

The foregoing statement has been made in order that all the facts might be before the Court. It is, however, desired to make entirely plain that the chief question of the case—*i. e.*, whether this American contract could be extinguished by any action of British officials—does not at all depend upon the peculiar facts regarding the respondents' voluntary charter to the British Government. The respondents' defense, sustained below, that a requisition did take place and that its effect was to extinguish the obligation of the charter, presents the main question. In other words, two distinct points arise:

(1) Even if there was a requisition, did it extinguish the obligation of the charter? (2) Was there any real requisition? The Courts below answered both of these questions in the affirmative.

POINTS.

FIRST.

The charterparty contains no restraints of princes clause or other appropriate exception. In the absence of such a provision, the general rule is that the obligation of the shipowner is absolute and that prevention by foreign law is not an excuse.

1. Where a shipowner enters into an absolute covenant to carry a cargo, without protecting himself by exceptions, he is of course bound to perform it. The practice of embodying certain exceptions in contracts of carriage is so common that one almost unconsciously assumes that a carrier is not liable for non-performance due to causes commonly covered by exceptions. Nevertheless, the law both in this country and in England is plain that the carrier is liable on his covenant unless he has protected himself by exceptions. Indeed, if this were not true, there would be no object in having exceptions.

An examination of the charter in suit (Record, pp. 150-158) shows that it contains no exception whatever applicable to the situation. The respondents in their answers (fols. 23-28) undertake to

set up certain clauses attached to the charter for insurance purposes, none of which, however, cover this case. It is, for example, provided (fol. 468) that bills of lading issued for the cargo shipped under the charter shall contain a clause permitting the ship to comply with the orders of the British Government or of the War Risk Insurance with regard to routes, times of sailing, etc. These provisions do not purport to cover a refusal to sail at all, and obviously they have no effect anyway, since no bills of lading were ever issued.

The other conditions referred to appear at folios 470-473 and are to the effect that the vessel's trades must be such as are lawful for British ships; that she shall not be used for such cargo as would expose her to seizure or condemnation by the Allies; and that there shall not be any breach of the warranties contained in the vessel's war risk policies, namely, that she shall comply so far as possible with the orders of the British Government and of the War Risk Insurance Committee with regard to such details of the voyage as route, ports of call and stoppages; that she shall not sail if ordered not to; that she shall leave enemy ports within the days of grace allowed by the enemy; and that she shall not enter a blockaded port. Obviously none of these provisions apply to the present case, and the District Court properly so held. Judge Hough said (fols. 702-703) :

"The parties executed a charterparty containing no restraints of princes clause—and (as I construe the document) no other clause or rider thereof authorizing either party to invoke the line of decisions construing and enforcing that phrase."

The following cases show the extent of the carrier's liability under these circumstances:

In *Spence v. Chodwick*, 10 Q. B., 517, certain goods were shipped by the plaintiff on the defendant's vessel from Gibraltar for London. There were certain exceptions not including restraints of princes. The declaration alleged shipment and non-delivery; the defendant pleaded that the goods had been seized and condemned by the Spanish authorities. This plea was held bad on demurrer. The Court said per Patteson, J., at page 528:

"The defendant's contract is to carry the plaintiffs' goods to London and he is liable for non-performance of his contract unless its performance was prevented by some of the exceptions provided against or by the act of the plaintiffs themselves or by the law of this country."

Per Wightman, J., page 530:

"The defendant here was prevented by unavoidable necessity from performing his contract. But he might have provided in his contract against the consequences of such a contingency; he has not done so and is without excuse."

This decision was followed in *Jacobs v. Credit Lyonnais*, L. R. 12 Q. B. D., 589 (more fully discussed below), and was approved by this Court in *Howland v. Greenway*, 22 How., 491, where a shipment of cargo was made at New York for Rio de Janeiro and was not delivered because it was seized by the Brazilian authorities in consequence of the master's failure to comply with the local customs regulations. This Court held that the shipowners' liability was absolute, saying:

"Their contract is an absolute one to deliver the cargo safely, *the perils of the sea only excepted*. Under such a contract *nothing will excuse them for a non-performance except they have been prevented by some one of these perils, the act of the libellant or of the law of their country*. No exception of a private nature which is not contained in the contract itself can be engrafted upon it by implication as an excuse for non-performance."

The opinion refers to *Spence v. Chodwick*, *supra*, with approval for the proposition that:

"When a party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may notwithstanding any accident by inevitable necessity because he might have provided against it by his contract."

In *The Harriman*, 9 Wall., 161, a vessel was chartered to carry a cargo of coal from San Francisco to certain South American ports to be named. Valparaiso was named. The coal was in fact destined for the Spanish navy. When the vessel reached South American waters, the Spanish navy had departed for an unknown destination, and the master returned to San Francisco. This Court held the shipowner liable, saying:

"*The existence of the war was known to both parties when the contract was entered into. The owner made no provision against any contingency. His engagement was simple, direct and unconditional that the vessel should proceed to Valparaiso. The presence or absence of the consignee was immaterial.* * * *

The answer to the obligation of hardship in all such cases is that it might have been guarded against by a proper stipulation. It is the province of courts to enforce contracts, not to make or mod-

ify them. When there is neither fraud, accident, nor mistake, the exercise of dispensing power is not a judicial function."

So, where by force of foreign law a charterer is unable to furnish cargo at the loading port, he is liable, unless the contract contains a proper exception.

Blight v. Page, 3 Bos. & P., 295.

Barker v. Hodgson, 3 Maule & S., 271.

In *Ashmore v. Cox*, L. R. 1899, 1 Q. B. D., 436, the contract was for shipment of 250 bales of Manila hemp at a certain time. Owing to the Spanish-American War, the shipment could not be made at the time fixed, but the seller was held liable in damages for his failure to ship. The Court (Lord Russell, C. J.) said:

"On behalf of the defendants it was also contended that they were excused from the fulfillment of the contract on the ground of impossibility of performance. This contention was divided into two heads. First, it was said that it was an implied condition of the contract and therefore not depending upon the express words of the contract, that it should be possible to ship between the named dates by sailer or sailers. * * *

The defendants have taken upon themselves the absolute responsibility of being able to make a declaration complying with the contract and appropriating to the contract 250 bales of the commodity shipped by sail or sailers between May 1st and July 31st, 1898. They have taken upon themselves (subject to the concluding clause of the contract) the responsibility that those events shall take place, or that they will pay damages if from any cause they are prevented from carrying out the contract. I therefore hold that there was no such implied condition."

This decision has recently been approved by the Court of Appeal in *Blackburn Bobbin Co. v. Allen*, 23 Com. Cas., 472.

So, too, in *Sun Printing Asso. v. Moore*, 183 U. S., 642, this Court said that it was a well settled rule of law that if a party by his contract has charged himself with an obligation possible to be performed, he must make it good unless its performance is rendered impossible by the act of God, the law, or the other party.

This passage was recently quoted with approval in *Carnegie Steel Co. v. United States*, 240 U. S., at 165.

In *Chicago, Milwaukee etc. Ry. Co. v. Hoyt*, 149 U. S., at 14, this Court said :

"There can be no question that a party may by an absolute contract bind himself or itself to perform things which subsequently become impossible, or to pay damages for the non-performance, *and such construction is to be put upon an unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract*, or where the impossibility arises from the act or default of the promisor. But where the event is of such a character that it cannot be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens."

In commenting on the above language, this Court in *Columbus Railway & Power Co. v. Columbus*, 249 U. S., 399, at 412, said :

"Particular reliance is had upon the last sentence of the paragraph just quoted. This language was used in interpreting a contract of doubtful import, as the context shows. Such interpretation was made in view of the situation of the parties at the time when the contract was made, and in view of the nature of the undertaking under consideration. It certainly was not intended to question the principle, frequently declared in decisions of this court, that if a party charge himself with an obligation possible to be performed, he must abide by it unless performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties will not excuse performance. Where the parties have made no provision for a dispensation, the terms of the contract must prevail. *United States v. Gleason*, 175 U. S. 588, 602, and authorities cited; *Carnegie Steel Co. v. United States*, 240 U. S. 156, 164, 165."

It is obvious enough that in the present case the event which occurred could readily have been anticipated and guarded against in the contract.

Numerous other decisions to the same effect might be cited; for example, *Ingle v. Jones*, 2 Wall., 1, where a builder failed to complete his work as agreed because of a latent defect in the soil upon which the foundation rested which made it necessary to take down and rebuild a considerable part of the building. This Court said:

"This covenant it was his duty to fulfill, and he was bound to do whatever was necessary to its performance. Against the hardship of the case he might have guarded by a provision in the contract. Not having done so, it is not in the power of this court to relieve him. He did not make that part of the building 'fit for use and occupation.' It could not be occupied with safety to the lives of the inmates. It is a well settled rule of law, that if a

party by his contract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him. *Beebe v. Johnson*, 19 Wend., 500; *Paradine v. Jayne*, Alleyn, 27; *Beal v. Thompson*, 3 Bos. & P., 420; 3 Com. Dig., 93."

So in *United States v. Gleason*, 175 U. S., 588, at 602, this Court said:

"While we are to determine the legal import of these provisions according to their own terms, it may be well to briefly recall certain well-settled rules in this branch of the law. One is that if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless his performance is rendered impossible by the act of God, the law, or the other party. Difficulties, even if unforeseen, and however great, will not excuse him. If parties have made no provision for a dispensation, the rule of law gives none, nor, in such circumstances, can equity interpose. *Dermott v. Jones*, 2 Wall. 1, sub. nom. *Ingle v. Jones*, 17 L. ed. 762; *Cutter v. Powell*, 6 T. R. 320, 2 Smith, Lead. Cas. 7th Am. ed. 1."

In *Berg v. Erickson*, 234 Fed., 817, the Circuit Court of Appeals for the Eighth Circuit reviewed the authorities at length and there held that an unusual drought did not relieve from a contract to furnish grass for cattle, there being no exception covering the case.

In *Rederiaktiebolaget Amic v. Universal Transp. Co., Inc.*, 250 Fed., 400, the Circuit Court of Appeals for the Second Circuit said:

"No action of the Swedish Government would excuse the defendant from its covenant to do so" (i. e.,

to deliver a bill of sale), "there being no exception in the agreement like that common in charterparties and bills of lading of arrests and restraints of princes."

A recent case on the subject in New York is that of *Richards v. Wreschner*, 174 N. Y. App. Div., 484, where a contract made in this country by a German firm to deliver in this country merchandise manufactured in Germany was held, in the absence of a proper exception, not to be excused by the outbreak of war between Germany and Belgium. The Court adopted the statement of the New York Court of Appeals in *Cameron-Haun Realty Co. v. City of Albany*, 207 N. Y., 377, as follows:

"When a party by his own contract creates a duty or charge upon himself, he is bound to a possible performance of it because he promised it and did not shield himself by proper conditions or qualifications."

The converse case is illustrated by *Furness, Withy & Co. v. Rederi Banco*, 23 Com. Cas., 99, where a Swedish ship was chartered to an English firm by a charter made in England and containing an exception of restraints of princes. According to Swedish law, the vessel could not lawfully perform the charter because under it she was to carry cargo between two ports both lying outside of Sweden. The Court held that this law constituted a restraint of princes within the meaning of the exception and that therefore the owner was not liable; but it is made clear in the opinion that, if the exception had been absent, the decision would have been to the contrary. The Court said at page 103:

"It is conceded by Mr. Dunlop, and is, I think, quite clear law, that *the mere fact that a contract is illegal by the law of a foreign State to which one of the contracting parties is a subject will not make that contract illegal or unenforceable if it is an English contract to be construed according to English law and to be enforced according to the law of this country.* Therefore, if it were not for the exception of restraint of princes, the Swedish owners in this case could not rely upon the fact that this charterparty is illegal according to Swedish law. But the charterparty contains the exception of restraint of princes."

In short the law has long been settled to the effect that, where there is an absolute obligation, difficulty or even impossibility of performance is no defense, except in cases of personal disability preventing performance of a contract for personal service, destruction of the subject-matter upon the continued existence of which the contract depends, and prohibition by domestic law.

There is no question here of the first or the third of these alternatives. The District Court sought to bring the case within the second, and in its opinion (fols. 708, 709) argued that "for the purposes of this suit, the *Ogilvy* was or became non-existent."

This suggestion is more fully discussed below (pp. 38, 39). It will suffice at this point to say that the ship did not cease to exist, any more than if she had stranded, or had had a collision, or had encountered any other obstacle. She was merely subjected to a restraint (assuming that the requisition was valid) of a kind not excepted in the charter and not permanent in its nature. Such a situation cannot possibly be treated like a case where the ship has been destroyed. It is simply a case where

performance has been rendered impossible for the moment by foreign law.

2. It seems hardly necessary to go into an extended discussion of the principle which has been settled so long and so definitely, that prevention of performance by foreign law is no excuse. This contract was an American contract made in New York and deriving its obligation from the law of the State of New York. This Court is an American court asked to enforce the contract. The performance of the contract was to begin in this country. The defense is that the law of another country, to wit, Great Britain, has interposed an obstacle. It makes no difference whether that law is a municipal regulation, an act of Parliament, an order in council or a so-called prerogative of the Crown. It is immaterial whether the law is British or French or Russian. If it be suggested that the fact that the cargo was to be discharged in British South Africa affects the question, the answer is found in the words of Mr. Justice Willes, in *Lloyd v. Guibert*, 6 Best & S., 100, where a contract of carriage required discharge at Liverpool. The Court held that the law of England as the place of discharge did not govern the case because it was "manifest that what was to be done at Liverpool was but a small portion of the entire service to be rendered, and that the character of the contract cannot be determined thereby." This passage is quoted and relied upon by this Court in *Liverpool v. Great Western Co. (the Montana)*, 129 U. S., 397.

See too *China Mutual Ins. Co. v. Force*, 142 N. Y., 90.

The case at bar simply presents another instance of the prevention by foreign law of the performance

of an American contract—the same question which has so often and so uniformly been decided by the courts both of this country and of England. The law is that if a foreign Government says to one of the parties to a domestic contract: “We will not let you perform your obligation,” the domestic court will say, “We do not recognize that a foreign power may destroy the obligation of our contracts and deprive our citizen of the benefit of his bargain. The contract must be performed or damages must be paid.”

The text writers are unanimous in laying down the rule that prevention by foreign law is no excuse. The following quotations from standard works will suffice:

8 Elliott on Contracts, par. 1891:

“Impossibility of performing a contract caused by a foreign law is no excuse for non-performance.”

2 Parsons, Contracts, 9th ed., p. 828:

“It would seem that a prevention by the law of a foreign country is no excuse, because this does not make the act unlawful in the view of the law which determines the obligation of the contract.”

Leake, Contracts, 6th ed., p. 510:

“An impossibility caused by foreign law or by the act of a foreign state does not discharge a contract in this country.”

To the same effect:

Wald's Pollock on Contracts, 3rd ed., p. 530.

Williston, Sales, Sec. 661.

Scrutton on Charterparties, 9th Ed., page 11 :

"If performance of the contract is rendered impossible by foreign law, a party cannot plead impossibility or illegality as a defense to a claim for breach of contract."

In the recent case of *Richards & Co. v. Wreschner*, 174 N. Y. App. Div., 484, at 488 (referred to at p. 29, *supra*), it is said :

"It is well settled that impossibility due to foreign law is no excuse."

The adjudicated cases to the same effect are many.

In *Kirk v. Gibbs*, 1 H. & N., 810, a charterparty provided that the vessel was to proceed to a Peruvian port, and there get a required pass and load a cargo of guano. Owing to the law of Peru, the defendant could not get the pass except for a part cargo. It was held that this was no excuse. The Court said :

"The obligation was on the defendant to get the pass."

In *Barker v. Hodgson*, 3 M. & S., 267, the charterer was to furnish a cargo at a certain Spanish port, but was prevented from doing so because all intercourse with the port was forbidden owing to an epidemic. Impossibility of performance by reason of this law was pleaded, but the Court said :

"If, indeed, the performance of the covenant had been rendered unlawful by the Government of this country, the contract would have been dissolved on both sides, and the defendant, inasmuch as he had been thus compelled to abandon the contract, would

have been excused for the non-performance of it, and not liable for damages. But if in consequence of events which happened at a foreign port, the freighter is prevented from furnishing or loading that which he has contracted to furnish, the contract is neither dissolved nor is he excused for not performing it, but must answer in damages."

In *Benson v. Trundy*, 13 Md., 20, a charterer was held liable for failing to furnish a cargo of guano from Peru in spite of the fact that its export was forbidden by the Peruvian Government. The Court followed the English rule as laid down in *Barker v. Hodgson*, 3 Maule & S., 267, basing the liability on the fact that the contract "contains no saving clause to meet the contingency" (p. 52).

And in *Clifford v. Watts*, L. R. 5 C. P., 577, 586, the Court commented on *Barker v. Hodgson*, saying, per Willes, J.:

"If the intercourse with the foreign port had been prohibited by the law of this country, the act would have been illegal, and the defendant would have been excused, not because he could not, but because he ought not to do it. But, where the performance of the thing covenanted to be done is not made impossible by the law of this country, the case falls within the principle laid down in the leading case of *Paradine v. Jane*, where the defendant, in an action for rent, sought to excuse himself by reason of his having been expelled from the premises by alien enemies, and his plea was held insufficient."

In *Harc v. Whitmore*, 2 Cowp., 784, it was held that a foreign embargo would not excuse a breach of a warranty to sail by a certain date. In *Atkinson v. Ritchie*, 10 East., 530, it was held that a foreign embargo was not a defense for breach of a contract to load.

In *Blight v. Page*, 3 Bos. & P., 295, where the defendant had agreed to load a full cargo of barley at Libau, Russia, it was held no defense to an action for freight that the Russian Government forbade the export of barley. To the same effect is *Sjoerds v. Luscombe*, 16 East, 201, where the Court said:

"if the freighter undertake what he cannot perform, he shall answer for it to the person with whom he undertakes."

In *Jacobs v. Credit Lyonnais*, L. R. 12 Q. B. D., 589, 20,000 tons of Algerian esparto were to be shipped by a French company. There was an insurrection in Algeria and the transport of esparto was forbidden. This would have been a defense under French law; but the Court held a plea setting forth these facts to be bad on demurrer.

The American cases, some of which have already been referred to, are to the same effect.

In *Duff v. Lawrence*, 3 Johnson's Cas., 162, where loading was prevented by war, Kent, J., said, page 172:

"If, therefore, the prohibition in question had arisen from our own Government either before or after the commencement of the voyage, it would have dissolved the contract. But as it arose from the government of another country, it does not dissolve, nor absolutely excuse the performance of the contract, because the laws of one nation do not give effect to the positive institutions of another inconsistent with its own."

In *Holyoke v. Depew*, 2 Ben., 334, Fed. Cas. No. 6652, a vessel was chartered for a voyage to the Canary Islands and return, the charter containing no restraints of princes clause. The authorities at

the Canaries would not permit the vessel to load unless she would first go to Spain for quarantine, which the master refused to do. *Held* (Blatchford, J.) that the owner was liable, because, there being no restraints clause, he had made an absolute engagement to take the cargo and could not plead the act of the authorities as an excuse. The Court said:

"In the absence of any clause exempting the vessel from liability because of the restraints of rulers and princes, I think the fault was hers in not being in a condition to receive the barilla, and that her owners and not the charterer must bear the loss. *Ogden v. Graham*, 31 L. T. Q. B. pt. 2, p. 29; *Spence v. Chodwick*, 10 Q. B. 528; *Brooks v. Minturn*, 1 Cal. 484."

In *Beebe v. Johnson*, 19 Wend., 500, the defendant sold to the plaintiff certain patent rights, agreeing to perfect them in England so as to secure to the plaintiff the exclusive rights in Canada. This could not be done because by the British law such exclusive rights could be granted only to British subjects. It was held, however, that this foreign law was no defense.

See, too, *Ye Seng Co. v. Corbitt*, 9 Fed., 423-430, where a shipowner had entered into a contract to carry coolies from China to the United States and it was held no defense that the Chinese authorities refused to permit the vessel to carry passengers.

In *Tweedie Trading Co. v. MacDonald*, 114 Fed., 985, the contract was to carry laborers from Barbadoes to Colon on four separate trips. After two trips had been made the Government of Barbadoes forbade the further carriage of laborers. It was held that this was no excuse to a suit for the charter money. The Court said (p. 988):

"Prevention by the law of a foreign country is not usually deemed an excuse when the act which was contemplated by the contract was valid in view of the law of the place where it was made and *a fortiori* when it was also then valid at the place of performance."

The cases of *Spence v. Chodwick* and *Richards & Co. v. Wreschner* have already been referred to (pp. 23, 29, *supra*). The latter is cited with approval by the Circuit Court of Appeals for the Ninth Circuit in *Swayne v. Everett*, 255 Fed., 71, at page 74, where the Court says:

"At the time of the occurrences in question, England and Germany were at war, but the United States was not; on the contrary, this country was then observing strict neutrality between those belligerents. How, then, can it be properly held that the performance of the clear legal duty of an American carrier to receive and transport goods tendered for carriage by an American citizen is excused on the ground that the British government had forbidden its citizens and corporations, one of which happened to be the agent of the American carrier, from receiving the tendered freight and providing for its transportation? Such is not the law as we understand it. See *Richards & Co., Inc. v. Wreschner*, 174 App. Div., 484, and the numerous cases there cited."

So here the right of an American citizen to have his contract performed is not destroyed by the fact that a foreign government has instructed the other party to the contract not to carry it out. The respondents did not guard themselves against that contingency and the loss should fall on them.

The foregoing authorities indicate what has always been considered clear law—that, in the absence of an exception in the contract, the interfer-

ence of a foreign government preventing the performance of the contract is not a legal excuse. This is well settled both in England and in this country.

As already pointed out, the District Court sought to bring the case within the authorities by calling it a case where the vessel was non-existent. This is a mere figure of speech. It might equally well be said that where there is an embargo preventing the loading of a cargo, that cargo is non-existent, and yet in case after case it has been held that liability exists under such circumstances. Indeed, any case of impossibility might be stated in similar figurative terms. Whenever a thing cannot be done, or carried, or secured, that thing is, for the purposes of that contract, non-existent. It cannot be put to the expected use. I agree to deliver a certain ship to a purchaser. If the ship is burned up, I am ordinarily excused. But if the ship exists, and I cannot deliver because I cannot get her, then I have broken my contract. It will not do for me to say, "I cannot get this ship to deliver to you; therefore the ship is, for our purposes, non-existent, and therefore our contract is at an end." Any case of impossibility, almost any case of breach, might be described in similar terms. Such a figurative phrase does not conduce to clear thinking and does not advance us in the solution of the problem. Where there is truly destruction of the subject-matter, a peculiar situation is created which the law, as the fairest solution, usually deals with by declaring the contract annulled. But where, the subject-matter being intact, an obstacle arises to the performance by one party, the question is: Is the nature of the obstacle such that, under the law or according to the provisions of the contract, the

default is excused? The law both of this country and of England is that prevention by foreign law does not excuse. Unless, therefore, well-settled law be overruled or unless an exception to the ordinary rule be created, the respondents are not absolved from liability by the act of the British Government.

It seems unnecessary to refer more particularly to the extract from the Defense of the Realm Act, pleaded in the answers, folios 32-33, and printed in the record at pages 206, 207. It declares that where performance of a contract is interfered with by any requirement of the Admiralty, etc., that fact shall constitute a defense. Of course the statute has no effect on an American contract in suit before an American court. The same observations apply to the Courts (Emergency Powers) Act, printed at pages 208-213.

SECOND.

There was no frustration of the charter.

The contention of the respondents will doubtless be that, admitting that foreign law is not a defense ordinarily, still the principle of frustration applies, and that such frustration may result from the act of a foreign government or from foreign law as well as in any other way.

The general principle is unquestionably as stated in the last point—namely, that an absolute obligation must be performed unless prevented by destruction of the subject-matter, domestic law, or the act of the other party. If the doctrine of frus-

tration is applied to cases where performance is prevented by foreign law, then either the general rule must be overturned (which is inconceivable) or else such cases must be treated as exceptions to the general rule, in which case the burden is on the respondents to bring the case clearly within the exception.

The doctrine of frustration appears to have come into being to correct what was felt to be the injustice of enforcing a contract under circumstances fundamentally different from those which the parties foresaw or could reasonably have been expected to foresee. It is perhaps a broader expression of the fundamental idea which underlies the rule that destruction of the subject-matter annuls a contract. Manifestly, it is to be applied with great caution. The Courts have usually sought to express the doctrine as one of "implied condition" in the contract; or as an attempt to effectuate what the Court believes to be the intent of the parties—*i. e.*, to write the contract as the Court thinks that the parties would have written it if they had framed a provision designed expressly to cover the contingency which actually arose. In spite of these attempts by the use of conventional phraseology to bring the doctrine of frustration within the general powers of the Court and to make it appear that the Court is merely construing and enforcing a contract already made by the parties, the plain fact is that the Court is making for the parties a new contract; or, perhaps more accurately, declining to enforce, for equitable reasons, the contract which the parties themselves have made.

The general rule is that absolute obligations must be enforced. To relax this rule unduly is, obviously, to extinguish the obligation of contracts.

Only in a case of the plainest need should the exception be applied. Where the parties must have had the contingency in contemplation and simply failed to provide for it, the Court cannot annul the contract.

It should be borne in mind that most of the cases of frustration are cases where *domestic* law has intervened and made performance impossible. In all the English requisition cases that was the situation. In *The Allanwilde*, 248 U. S., 377, that was the situation. All of these cases fall within the general and universal rule that prevention by domestic law is an excuse. Moreover, in nearly every case a restraints of princes clause was present; and the parties thus manifested their intent that in the event of such interferences there should be no liability.

In previous cases, too, it has been proved to the satisfaction of the Court, either by the evidence of witnesses or by the inherent nature of the detention, that it would in all probability last for indefinitely and unreasonably long periods.

In no case has the defense of frustration been upheld where the situation has been what it is here: (1) American contract sought to be terminated by foreign law; (2) charter made in contemplation of an existing war; (3) no restraints clause; (4) no evidence that the requisition would be prolonged; (5) requisition occurring five weeks before the cancelling date, with some intimation that it would continue for a few weeks only; (6) a charter which required the ship to tender even if she was behind her cancelling date; (7) voluntary fixture by the owner for a six or seven months' service; (8) total repudiation of the charter *at once*.

In order to succeed under the facts of this case, the respondents must establish that the *mere fact* of requisition, *ipso facto* and without more, as matter of law, terminated the charter. Without an exception, without proof of the probable length of the requisition, without any facts in the record from which the Court can reach a conclusion about its probable length, there is nothing here but the mere fact that the vessel *was requisitioned*. No case has ever held that this alone is enough to accomplish frustration; several cases have held the contrary.

In the case of *Admiral Shipping Co. v. Weidner & Co.*, 13 Asp. M. C., 246, at 249, Mr. Justice Bailhache gave the following definition of frustration, which has since received judicial approval in other courts:

"The commercial frustration of an adventure by delay means, as I understand it, the happening of some unforeseen delay without the fault of either party to a contract of such a character as that by ~~it~~ the fulfilment of the contract in the only way in which fulfilment is contemplated and practicable is so *inordinately postponed* that its fulfilment when the delay is over will not accomplish the only object or objects which both parties to the contract must have known that each of them had in view at the time they made the contract, and for the accomplishment of which object or objects the contract was made."

Apply this to the case at bar: (1) The libellant's purpose was to get oil carried; the respondents' was to earn freight. Neither of these objects would be frustrated by delay. (2) The delay was certainly not "unforeseen." All the world knew, when

this charter was signed, that requisitions were common enough. (3) There is no evidence that the fulfilment would have been "inordinately" postponed, or that any postponement would in the slightest degree have affected the objects which the parties had in view. The case does not in the least fall within the definition.

The fundamental test under this definition is the effect on the contract of the probable delay involved. That is the question chiefly considered in all the frustration cases. A contract is never held to be dissolved unless the delay is plainly going to be so long as to make the contract a different contract and to defeat the objects of the parties. Thus in the leading case of *Jackson v. Union Marine Ins. Co.*, L. R. 8 C. P., 572; L. R. 10 C. P., 125, a vessel en route to her loading port stranded on January 3rd, was floated on January 4th, very badly damaged, and was still under repair at the time of the trial in August. The jury found that the delay was so long as to make it unreasonable to require the charterer to furnish a cargo after repairs were finished, and on this finding the Court held that the shipowner could not enforce the charter. In the Exchequer Chamber the ground of decision is stated as follows by Bramwell, B.:

"I understand that the jury have found that the voyage the parties contemplated had become impossible; that a voyage undertaken after the ship was sufficiently repaired would have been a different voyage; not, indeed, different as to the ports of loading and discharge, but different as a different adventure—a voyage for which at the time of the charter the plaintiff had not in intention engaged the ship nor the charterers the cargo; a voyage as different as though it had been described

as intended to be a spring voyage, while the one after the repair would be an autumn voyage."

As was said by Viscount Haldane in *Bank Line v. Capel & Co.*, 35 T. L. R., 150; 14 Asp. M. Cas., 370:

"Whether frustration has taken place is always a question which depends on the circumstances to which the principle is to be applied, rather than upon abstract considerations."

The question must, therefore, be decided on the facts of each case; but frustration is not lightly to be found. Lord Sumner in the *Bank Line* case, *supra*, puts it accurately in saying that:

"When the causes of frustration have operated so long or under such circumstances as to raise a presumption of *inordinate delay*, the time has arrived at which the fate of the contract falls to be decided."

In other words, requisition alone is not enough. Either the frustrating causes must operate for a long time or the circumstances must be such as to make it plain that they will so operate as to produce "inordinate delay." There are no facts in this case on which such a finding could be based.

These tests seem to have been applied consistently in the cases. In the case of *F. A. Tamplin SS. Co. v. Anglo-Mexican Co.*, 1916, 2 App. Cas., 397; 13 Asp. M. C., 467, Lord Loreburn said:

"I cannot infer that the interruption either has been or will be in this case such as makes it unreasonable to require the parties to go on."

On the other hand, where it has been clear that the delay must of necessity last for *the entire period of a war*, the contract has been generally held frustrated. In *Geipel v. Smith*, L. R. 7 Q. B., 404, Lush, J., said:

"A state of war must be presumed to be likely to continue so long, and so to disturb the commerce of merchants, as to defeat and destroy the object of a commercial venture like this."

So where a British vessel was in a Baltic port at the outbreak of the recent war, it was said (per Swinfen Eady, L. J.) that "the enforced delay by reason of the war is of such long and indefinite duration as completely to frustrate the adventure in a mercantile sense." (*Admiral Shipping Co. v. Weidner & Co.*, 1917, 1 K. B., 222; 13 Asp. M. C., 539; *Scottish Navigation Co. v. W. A. Souter & Co.*, 1917, 1 K. B., 222; 13 Asp. M. C., 539.) There the delay had already lasted for some three months before the matter of frustration was brought up.

In the American cases also the test of probable duration is the decisive one. It was so held both by this Court in *The Allanwilde*, 248 U. S., 377, and by the Circuit Court of Appeals for the Second Circuit in *Earn Line v. Sutherland SS. Co.*, 264 Fed., 276. In *The Allanwilde*, the Government had forbidden the clearance of sailing vessels for the war zone because of the submarine danger. The *Allanwilde* was bound from New York for France. This Court said at page 386:

"The duration was of indefinite extent. Necessarily the embargo would be continued as long as the cause of its imposition—that is, the submarine menace—and that, as far as then could be inferred, would be the duration of the war, of which there

could be no estimate or reliable speculation. The condition was, therefore, so far permanent as naturally and justifiably to determine business judgment and action depending on it."

To the same effect:

Geipel v. Smith, supra.

Here there was no reason to expect detention for the duration of the war. In fact the vessel was released as soon as she finished the four voyages for which her owner committed her. In other cases—*e. g.*, *Modern Transp. Co. v. Duncric SS. Co.*, 1917, 1 K. B., 370—vessels were released after short periods of service. Other instances appear in the case of *Chinese Mining Co. v. Sale*, L. R. 1917, 2 K. B., 599; 22 Com. Cas., 352. There the steamer *Albiana* was requisitioned in July, 1915, released in September, and not again requisitioned until December, 1916. The *Wimbledon* was requisitioned in August, 1914, released in December, 1914, and again taken in January, 1916. These instances show that the release of the *Baron Ogilvy* after two months' service was quite possible. That would have been on June 10th, less than a month after the cancelling date.

On the other hand, where it has been proved as a fact that there is no likelihood of the ship's release for an inordinately long period, frustration has been found. This was the case in *Countess of Warwick SS. Co. v. Le Nickel Societe Anonyme* and *Anglo-Northern Trading Co. v. Emlyn, Jones & Williams*, 1918, 1 K. B., 372; 14 Asp. M. Cas., 242. There it was proved by the testimony of shipping experts that there was no hope of the vessel's release until the war was ended.

In *Bank Line v. Capel & Co.*, 35 T. L. R., 150, the charter was for twelve months. The vessel was requisitioned at about the time when she would have entered upon performance. It was held by a divided court that the charter was terminated because detention had already lasted so long (about four months) as to make performance at its termination performance of a different contract. Lord Wrenbury expressed the opinion (p. 156) that the contract would continue for a reasonable time—say two months—but that four months was more than a reasonable time.

In *Earn Line v. Sutherland SS. Co., Ltd.*, 264 Fed., 276, a case of time charter, it was proved as a fact, and so found by the Court, that "in January-February, 1917, having regard to the then violence of German submarine warfare on merchant vessels, and the success thereof, no reasonable man would have expected or even dared hope that the *Claveresk*, once taken into Government service, would be released for any use contemplated by the charter of 1913, before the expiry of the term of that charter."

That finding was the basis of the decision. The Court did not hold, nor, it is submitted, can any court reasonably hold, that *the mere fact of requisition*, without more, extinguishes such a charter as this. It is a question of proof as to whether performance has become so clearly and hopelessly remote as to warrant the Court in putting into the contract a new condition and calling it frustrated.

The following cases indicate that even prolonged detention or absolute change of circumstance does not of necessity bring about frustration.

In *Blackburn Bobbin Co. v. Allen Co.*, 23 Com. Cas., 271, a contract was made before the war for sale of a quantity of Finland timber. The outbreak of war made the importation of such timber impossible. The sellers claimed that the contract had been dissolved by the outbreak of the war. The opinion of the Court (McCardie, J.) discusses the doctrine of impossibility of performance at great length and holds that the contract in suit was not extinguished by the outbreak of the war. His decision was affirmed by the Court of Appeal (23 Com. Cas., 471).

In *Hudson v. Hill*, 2 Asp. N. C., 278; 43 L. J. C. P., 273, there was a voyage charter under which lay days were to begin on April 1st. Owing to bad weather and other difficulties, the vessel did not reach the loading port until July 28th. Held, no frustration—charterer must load.

To the same effect is *Jones v. Holm*, 2 Ex., 335, where a vessel, after arrival at the loading port in March, took fire and was not repaired until July 30th. It was held that the charterer was bound to load and that the charter was not ended.

So in *The Progreso*, 50 Fed., 835, it was held that a delay of a month, due to quarantine, did not terminate the charter. The charter was a voyage charter and the charterer had an option to cancel if the vessel did not arrive on or before October 1st. There was a restraints clause. The authorities at the loading port imposed a quarantine which extended for a month beyond the cancelling date. It was held that the charter was not thereby terminated and that the shipowner was liable for refusing to perform.

And see:

The Star of Hope, 1 Hask., 36; F. C. 13312.

Hadley v. Clarke, 6 Term. R., 259.

Lazarus, Insurance of Freight, 135, 136.

The Patria, L. R. 3 Adm. & Ecc. (where even a blockade of the port of destination was held not to terminate a charter).

Hurst v. Usborne, 25 L. J. C. P., 209; 18 C. B., 141 (delay of several months in reaching loading port did not frustrate).

Assicurazioni Generali & Co. v. Bessie Morris SS. Co., 7 Asp. M. C., 217; 1892, 2 Q. B., 652 (where stranding, partial submergence of the vessel and delay of nearly two months for repairs did not frustrate).

Clark v. Mass. Fire & Marine Ins. Co., 2 Pick., 104 (where delay of two months for repair, causing the charterer to lose the object of the voyage, did not frustrate).

In 3 Kent Com., 14 Ed., Sec. 249, it is said:

“But a temporary impediment of the voyage does not work a dissolution of the charterparty; and an embargo has been held to be such a temporary restraint, even though it be indefinite as to time. The same construction is given to the legal operation of a hostile blockade, or investment of the port of departure, upon the contract. It merely suspends the performance of it, and the voyage must be broken up or the completion of it become unlawful, before the contract will be dissolved. If the cargo be not of a perishable nature, and can

endure the delay, then the general principle applies that nothing but occurrences which prevent absolutely the execution of the contract will discharge it. The parties must wait until those which merely retard its execution are removed."

That the mere fact of requisition is not enough is shown (if proof be needed) by the cases where charters have been held to survive requisition—*c. g.*, *Tamplin Co. v. Anglo-Mexican Co.*, 2 App. Cas., 397; *Modern Transp. Co. v. Duncric SS. Co.*, 1917, 1 K. B., 370; *Chinese Mining Co. v. Sale*, 1917, 2 K. B., 599; 22 Com. Cas., 352.

If a physical obstacle to the performance of a charter arise—such as stranding or collision—which may or may not cause long detention, no one would claim that the charter is ended without some evidence as to the probable duration of the delay. Why is it different with a legal obstacle? In case of the stranding or collision, the delay would be excused if the charter contained a suitable exception, but the obligation to perform would persist unless and until it became evident that extraordinary delay would ensue. The present, too, is a particularly strong case because the cancelling clause (quoted above, pp. 3, 4) plainly indicates that even though the ship might be delayed beyond her cancelling date, it was the duty of the owner to tender her at the loading port, and that the charterer was then entitled to make its election as to cancellation. Moreover, the cancelling date was still five weeks away. Yet here the owners absolutely and finally repudiated the charter as soon as the requisition telegram was received.

All the decisions turn on the probable duration of the requisition. Either this is established by

evidence or, if sufficient information appears in the record, is found by the Court from the circumstances. Unless in one way or another it appears that the requisition will last for an unreasonably long time, the contract stands unaffected. So in *Modern Transportation Co. v. Dunic SS. Co.*, 1917, 1 K. B., 370; 13 Asp. M. C., 490, the charter was for a year. The vessel was requisitioned after five months' service and released after six months. It was held that the charter was not ended.

In *Miller & Co. v. Taylor & Co.*, 32 T. L. R., 161; L. R., 1916; 1 K. B., 402, the contract was for the purchase of confectionery for export, delivery to be in August and September, 1914. War began on August 4, 1914. On August 10, the Government forbade the export of sugar; on August 14, the plaintiffs (vendors) cancelled the contract. On August 20, the embargo on sugar was lifted. The plaintiffs claimed that the contract was destroyed by the embargo; but the Court of Appeal unanimously held the contrary, saying:

"In the present case, if the interruption had been such that the contracts could not be carried out within a reasonable time, that would have sufficed to invalidate the contracts. If, on the other hand, the interruption was not such as to have that effect, there was not such an interruption as would annul the contracts. The contracts here were to manufacture goods in a reasonable time. No time was specified in the contracts, and the usual course of business between the parties was that goods should be delivered within six or eight weeks. The duty of the plaintiffs after the Proclamations of August 5 and 10 was to wait a reasonable time to see if they could carry out the contracts, and if they had done this the result would have been that

the contracts would have been duly carried out. The suspension of the power to export confectionery was for a very short period, and would not have prevented the contracts from being carried out in the manner contemplated by the parties."

This case, while recognizing the principle of frustration, declines to apply it where it is not shown that frustration has really taken place. It stands for the proposition that reasonable inquiry must be made and the probable long duration of the obstruction be clearly established before a case of frustration arises.

It is said in some cases that the rights of the parties should, for reasons of commercial convenience, be determined *eo instanti*, and that they should not be obliged to wait, in uncertainty as to their rights, for a long period. Everyone will agree that this is desirable. But it does not at all follow that either party is entitled, the moment he hears of the obstacle, to repudiate all responsibility without evidence and without inquiry as to whether there is really going to be a frustration or not. The statement sometimes made that the rights of the parties are fixed *eo instanti* does not mean that there is always a frustration, nor does it mean that either party may on the instant take it for granted that there is a frustration without waiting long enough to make an intelligent effort to find out. Still less does it mean that one party is at liberty to make such a voluntary fixture as was made here and thereby cut off all possibility of an early release.

Turn the case around. Suppose that the petitioner, hearing that the *Baron Ogilvy* had been requisitioned, had instantly cabled the respondents that it considered the charter at an end. Suppose

then that the respondents had succeeded in procuring the vessel's release and had tendered her at the loading port by May 15. The petitioner would certainly have been liable if it refused to load her. It would be impossible for it to justify a repudiation of the charter based on nothing but the mere fact of a requisition. Certainly, if either party is bound, then both are.

In considering this case, it must be remembered that it came up early in the war. At that time there was not the terrible scarcity of tonnage that occurred two years later. In early 1915, when the *Baron Ogilvy* was requisitioned, there was no serious shortage of vessels and indeed the *Baron Ogilvy* herself was released as soon as the four voyages were finished.

The cases where frustration has been found fall into two classes: (1) Where the attendant circumstances show that the detention is bound to be inordinately long—*i. e.*, where it will of necessity last as long as a war lasts; (2) where facts are proved which show that it will last inordinately long—*e. g.*, where there is damage which cannot be repaired for a long time or where there is evidence that a requisitioned ship is certain to be kept for a long period. Unless in one or the other of these ways the length of the detention is made manifest, the Court will not overthrow the contract of the parties. The present case does not fall within either of the classes referred to; and contracts should be set aside only when the circumstances very clearly require it. The doctrine of frustration is a dangerous one. It is applicable only when the Court can clearly say that, if the parties had expressly dealt with the situation presented, they

would have done so by abrogating the contract. As Lord Sumner said in *Bank Line v. Capel & Co.*, 1919 A. C., 435, at 460:

"The danger in each case so put is that the jury will think that the contract is as wax in their hands. A. T. Lawrence, J., puts the matter very usefully thus in *Souter's case*, 1917, 1 K. B. at p. 249: '*No such condition (i. e., that the contract is to be considered at an end) should be implied when it is possible to hold that reasonable men could have contemplated the circumstances as they exist and yet have entered into the bargain expressed in the document.*'" (Italics ours.)

In *Comptoir Commercial Andersois v. Power Son & Co.*, 36 T. L. R., 101, it was held that a contract for the sale and shipment of wheat was not dissolved by the fact that war had broken out and that it was impossible to secure insurance against war risks and consequently to sell exchange, which was the customary method of financing such a transaction. In holding that no defense was established, Lord Justice Scrutton said (36 T. L. R., 105):

"They (the courts) ought not to imply a term merely because it would be a reasonable term to include if the parties had thought about the matter, or because one party, if he had thought about the matter, would not have made the contract unless the term was included; *it must be such a necessary term that both parties must have intended that it should be a term of the contract and must have only not expressed it, because its necessity was so obvious that it was taken for granted.*" (Italics ours.)

If this Court is seeking to ascertain and apply the presumed intent of the parties, how can the Court find on the present record that the charter is terminated? If it had been foreseen that, five weeks prior to May 15th, the British Government, desiring vessels "for some weeks" to carry hay, would take the *Baron Ogilvy*, what reason is there to suppose that the petitioner would have said that it did not want the ship at all? Tonnage was not plentiful, rates were rising (fols. 185, 209); in all human probability the petitioner would have said just the opposite—that even if the ship would not be ready by her cancelling date, she must report for loading in accordance with the charter and that she would be used.

It must also be borne in mind that the owners deliberately put it out of their power to perform the charter for six or seven months. The ship might have been released from the original requisition in a few weeks. They deliberately made it certain that she would not be. Surely a man cannot, by his own act and for his own advantage, change an indefinite detention of possibly very short duration into a definite detention of certainly long duration, and then use the condition thus created by himself as a reason why he should be excused from his contract. The respondents first tied up their vessel for four round trips and then immediately repudiated all obligations. They might have said: "We are prevented for the moment from performing; but, if the restraint is lifted within any reasonable time, we will at once carry out our agreement." This would be the course required by the authorities discussed above. They might at least have made inquiries as to the probable duration of the requisition before they

threw up the charter. Instead, on the very same day, they fixed the ship for a prolonged period and said: "We will have nothing more to do with you." Even if an excuse exists in so far as there is a Government restraint, it surely ceases when an owner voluntarily subjects himself to a greater and longer restraint than he has to, and does it to get better rates.

The respondents have not proved that the requisition caused such an interruption of the vessel's service as to terminate the charter. They have merely proved a requisition of uncertain but apparently moderate, probable duration, *for which they chose to substitute a voluntary engagement* for an extended period. No decision has ever upheld such a defense.

Courts should not apply the doctrine of frustration save in the clearest cases. These parties had in view the possibility of requisition; yet they made their contract absolute. The charterer stipulated that the ship should report for loading even after the cancelling date—it evidently wanted her whenever it could get her. What power has a Court to deprive the charterer of the right for which it expressly stipulated—that the ship should report for loading whether she arrived early or late? This question came up in *The Progreso*, 50 Fed., 835, where the Circuit Court of Appeals for the Third Circuit held that under a similar clause it was the duty of the vessel to tender under the charter, even though it could not be done for more than a month after the cancelling date. The Court said:

"The transportation of the cotton was the object to be attained. Whether that transportation com-

menced on October 1st or November 1st was not as material as that the cotton should be transported. This is evidenced by the fact that delay in arriving at the port of lading did not avoid the contract by its terms, but such avoidance for such cause lay solely in the discretion of the charterers."

Nothing in this record warrants a finding that the charter could not have been performed within a reasonable time, had not the respondents prevented it by engaging for four voyages. The case is not within either the rule or the reason of the rule which the decisions on frustration have laid down.

THIRD.

The alleged requisition was not in reality a legally valid requisition; and the diplomatic officers of a foreign government cannot, by *ex parte* statements, preclude the Courts of the United States from ascertaining the true facts; nor should the Courts of the United States receive or act on such statements, at least unless made through and with the sanction of the Department of State.

As already pointed out, the only act done by way of requisition was the sending of the following telegram (fol. 538):

"Hogarth Glasgow S S *Baron Ogilvy* is requisitioned under Royal proclamation for government service."

The Royal proclamation referred to, which appears at pages 204-205, authorizes the Lords Commissioners of the Admiralty,

"by warrant under the hand of their Secretary or under the hand of any Flag Officer of Our Royal Navy holding any appointment under the Admiralty, to requisition and take up for Our service any British ship," etc.

The telegram was sent by a Mr. Foley, a subordinate official in the service of the British Admiralty.

1. *The telegram did not constitute a valid requisition.*

The requisitioning telegram by its own terms was grounded upon the proclamation. No warrant or other action of the Secretary of the Lords Commissioners of the Admiralty or of any Flag Officer was ever taken. The requisition obviously and on its face was wholly outside the authority of the very document on which it purported to be based. The evidence of Sir Henry Erle Richards, who testified orally at pages 120 to 131, and whose written opinion appears at page 159, is to the effect that requisition by means of the telegram in question was not a valid action under the proclamation, and was not otherwise valid. It appeared from the evidence of Mr. Foley, who was assistant to the Director of Transports (fol. 235), that ordinarily an official requisitioning letter was sent (fol. 245), but that this was not done in the present case. Such a letter, if signed by one of the persons designated in the proclamation, would be, no doubt, a valid requisition. There was, however,

nothing in the nature of the "warrant" required by the proclamation (fol. 257). It was the opinion of Sir Henry Erle Richards that under these circumstances there was no valid requisition (fols. 478-479). In answer to the contention that the requisition might be supported as an exercise of the prerogative of the Crown apart from the proclamation, he points out (1) that the telegram "purports to derive authority from the proclamation and not from the prerogative alone"; (2) that the prerogative of the Crown cannot be exercised by any subordinate, but must be exercised by "an official of high rank or an official specially authorized. Mr. Foley himself without special authority could not exercise the prerogative and, as I have pointed out, he did not purport to do so" (fol. 479).

2. The British Embassy's certificate and suggestion should not have been received, unless through the State Department, and could not preclude the Courts of the United States from ascertaining the true facts or from adjudicating the rights of private litigants in accordance with the facts thus ascertained.

It was sought by the respondents to avoid any examination into the alleged requisition and its effect by the device of a suggestion and certificate from the British Embassy. Although the parties to this litigation are private persons and although no relief is asked for against the British Government, still the diplomatic officers of that government have intervened and sought by an *ex parte* statement, not under oath, not subject to cross-examination, and not dealing with facts of which they have any personal knowledge, to determine

conclusively issues both of fact and of law, and to compel the Courts of this country to accept such determination without question. A similar procedure has been acquiesced in other cases by the Circuit Courts of Appeals of the Second and the Third Circuits (see *The Carlo Poma*, 259 Fed., 369; *Agency of Canadian Car Co. v. American Can Co.*, 258 Fed., 363; *Earn Line Steamship Co. v. Sutherland Steamship Co.*, 264 Fed., 276; *The Adriatic*, 258 Fed., 902), and it has thus come about that American litigants in those courts find a deaf ear turned to their evidence and their arguments because a foreign government has chosen to inject itself into the litigation and in effect to dictate to the Court certain conclusions of fact and law.

In the present case the respondents are claiming that the act of foreign law prevented their performing their contract. It is certainly open to the Court to ascertain whether or not that is true. That inquiry necessarily involves determining whether foreign law did in fact interfere with the respondents' control of the *Baron Ogilvy*, and it is most earnestly urged that the *ex parte* statement of a foreign official to an American Court cannot possibly shut the eyes of the Court and foreclose the rights of an American litigant. It is submitted that it is nothing short of monstrous to hold that such suggestion and certificate are conclusive. It would be to confer upon foreign diplomatic representatives an almost unparalleled standing in court and to give them power which might, on occasion, give rise to serious abuse.

Such action would mean that, in any suit in which a foreign government might claim to be interested, its diplomatic representative might present to the Court an *ex parte* certificate as to con-

troversial facts and that the statements contained in such a certificate would be conclusive on the Court.

The well-recognized diplomatic practice is that all communications from foreign governments and their representatives are addressed to the Secretary of State, who, subject to the direction of the President, has exclusive jurisdiction over such matters. The following statement of this rule may be quoted from the despatch of Secretary Seward to Mr. Dayton, Minister to France, June 27, 1862 (4 *Moore's Inter. Law Digest*, 686) :

"This Department is the legal organ of communication between the President of the United States and foreign countries. All foreign powers recognize it and transmit their communications to it, through the dispatches of our ministers abroad, or their own diplomatic representatives residing near this Government. These communications are submitted to the President, and, when proper, are replied to under his direction by the Secretary of State."

And conversely :

"It is not regular for any other authority than that of the department of foreign affairs in the country where diplomatists are accredited to address letters upon public business directly to them. When such other authority has occasion to communicate with them, this is invariably done through the department intrusted with the foreign relations of the country" (Mr. Fish, Sec. of State, to Mr. Cox, Jan. 22, 1874, 101 MS. Dom. Let. 165).

In *The Luigi*, 230 Fed., 493, where a vessel was libeled for breach of charter and counsel representing the Italian Government appeared and "suggested" that the vessel be released, as a public

vessel in the service of the Italian Government, the Court (District Court, Eastern District of Pennsylvania, Thompson, J.) said:

"The Court was of the opinion that inasmuch as the suggestion raised a question of international comity, it should come through official channels of the United States Government."

The Court accordingly refused to receive the suggestion, until it was renewed by the District Attorney, "at the instance of the Attorney General."

In *The Florence H.*, 248 Fed., 1012, a suit for collision, it was, on behalf of the Republic of France, suggested that, as the vessel and crew were in the employ of the French Government, the Court should not take jurisdiction. The Court said:

"A suggestion from the Secretary of State would be one thing, since he is charged with the responsibility for our relations with other powers. But a court which is not authorized to treat in any fashion with foreign powers should be in consequence quite inaccessible to any suggestion which is based upon international considerations."

So in the case of *The Isle of Mull*, 257 Fed., 798, where an appearance and certificate similar to those in the case at bar were offered in a similar case on behalf of the British Government, Judge Rose refused to receive them and said (Stenographer's Minutes, p. 29):

"I cannot feel that a question of disputed fact between parties one of them a citizen of this country and one a citizen of England should be tried *ex parte* before the British Ambassador and decided *ex parte* by me. There is a difference of opinion among the experts as to what was done

and you are at the instance of one of the parties having an *ex parte* trial of that question disputed in England before some one in the foreign office and the foreign office issues this certificate, which precludes further examination of the subject."

The undesirability of such practice could hardly be better expressed. Judge Rose also pointed out (Stenographer's Minutes, pp. 2 and 3) that the embarrassment which a court would feel in holding such a certificate to be untrue made it, in his opinion, the only safe rule to have the State Department first investigate the question and that then, if the suggestion comes to the Court, accompanied by a similar suggestion from the State Department, it might be received and held decisive.

In *South Carolina v. Wesley*, 155 U. S., 542, which was a suit for possession of certain land, the Attorney General of the State of South Carolina filed a suggestion to the effect that the property in question was occupied by the State for public purposes and asked that the suit be dismissed. The trial court denied this application, and the case was taken by writ of error to this Court. In dismissing the writ of error, this Court said:

"The record does not show that the averments of the suggestion were either proved or admitted, and it certainly cannot be contended that the Circuit Court ought to have arrested proceedings on a mere suggestion. *United States v. Peters*, 5 Cranch, 115; *The Exchange*, 7 Cranch, 116; *Osborn v. Bank of the United States*, 9 Wheat, 738; *United States v. Lee*, 106 U. S., 196; *Stanley v. Schwalby*, 147 U. S., 508."

If such suggestions are to be received at all, and particularly if they are to be given any conclusive

effect, it is submitted that the Court should require that they come through the State Department and that they be supported by the result of that Department's inquiry.

It is further submitted that the importance of having the proper procedure settled and the proper effect of such certificates determined is very great; and that this matter alone is sufficient to make it appropriate to grant *certiorari* herein.

In the Courts below certain authorities were cited as establishing that both this Court and the Courts of England uphold the practice of receiving such certificates and their conclusiveness. It is submitted that the cases referred to, which are briefly considered below, do not support any such propositions.

In *United States v. Peters*, 3 Dall., 121, a libel was filed for damages against a vessel commissioned by the French Government, for the alleged capture of a vessel of the United States. These facts appeared from an affidavit of the master of the French vessel, who moved for prohibition and, the motion having been heard on the proof thus offered, and *there being no dispute as to the facts*, the motion was granted. The case stands for nothing more than the proposition that a libel against a public vessel commissioned by a foreign government will be stayed by a prohibition upon application made by affidavit *where the facts are undisputed*.

The Exchange, 7 Cranch., 116, holds simply that a foreign public vessel is not subject to the jurisdiction of the United States courts. In that case the facts were made to appear by the intervention of the United States District Attorney *at the in-*

stance of "the Executive Department of the Government of the United States," who filed a suggestion stating the facts. The commission from the French Government under which the vessel sailed was also produced and supported by affidavits of the master and of the French Consul. It therefore appeared both by the certificate of the proper officer of the United States and by affidavits what the character of the vessel was and her flag, commission and possession by French officers were all proved by competent evidence, and not merely by the suggestion of a foreign government. Here again there was *no dispute about the facts*.

In *Dupont v. Pichon*, 4 Dall., 321, the question was as to the immunity from arrest of the French *chargé d'affaires*. His official character was proved (1) by the production of his credentials and (2) by the taking of his deposition. Even with that proof, the Chief Justice "seemed inclined to wait for information from the Department of State, as to his actual reception by the President in that character." But, since it appeared that to wait for this would involve imprisoning him in the interim, the Court finally discharged him.

In *The Parlement Belge*, L. R. 5 P. D., 197, the facts as to the character of the vessel appeared from an intervention of the Attorney General. In that case, therefore, the Court had the certificate of the proper officer of its own government before it.

The Constitution, L. R. 4 P. D., 39, is the only one of the cases referred to where a foreign representative appears to have communicated directly

with the Court. There the Minister of the United States wrote to his solicitors a letter which was read to and considered by the Court. The Admiralty Advocate representing the British Government also intervened and protested against the exercise of jurisdiction, so that the Court again had the representative of its own government before it. Here also the facts were not disputed.

In *The Crimdon*, 35 T. L. R., 81, the Court held that a Swedish steamship under time charter to the United States Shipping Board Emergency Fleet Corporation was not subject to process. There the facts appeared by an affidavit to which were attached letters, the nature of which does not appear from the report, but which apparently stated the facts as to the employment of the vessel. These facts were not disputed.

The foregoing cases indicate that the practice of communicating directly with the Court and of claiming that the Court is bound by such communication is not supported by the cases in the Supreme Court and the English courts referred to. It is also to be observed that in the present case there is very much more than a certificate of a mere fact. There is presented to the Court a statement involving conclusions both of fact and of law. There is also before the Court evidence showing what the true facts are, i. e., that the vessel was employed under a voluntary charter.

The British Embassy seemingly denies the right of our Courts to examine and construe the Royal Proclamation and the acts purporting to be done thereunder. Yet in *King v. Delaware Insurance Co.*, 6 Cranch, 71, where an American vessel was warned by a British warship not to go to her des

mination on account of a blockade, this Court examined and construed the British Orders in Council and held that they did not prohibit the voyage in question and that therefore there was not a restraint of princes within the meaning of a policy of insurance on the freights. Surely that case would not have been decided differently if the British Embassy had avowed the act of the warship. So in *Corp v. United Insurance Co.*, 8 Johns., 277, an unauthorized threat of capture from a British cruiser was held not to constitute a restraint of princes under an insurance policy. These are clearly cases where acts done by the officials of foreign governments have been held unauthorized and therefore inoperative.

FOURTH.

The suggestion and certificate of the British Embassy do not state that the vessel was under requisition during the period in question.

When closely examined, it will be seen that the suggestion and certificate were carefully drawn and do not, in fact, allege that the vessel was *under requisition* during the months from April to October, 1915. They set forth, in nearly the same language (fols. 126-130), that the vessel was requisitioned on April 10, 1915, but they do not say that she remained under requisition. They go on to allege

"that the period of the said requisition was indefinite; and that from and after the date of requisition the steamship *Baron Ogilvy* was continually in the

service of the British Government and was operated solely under the orders and direction of the British Admiralty until October 20th, 1915."

Consistently with this allegation there may have been a special voluntary charter for certain voyages in lieu of requisition, and the evidence already examined shows that this was undisputedly the fact. In place of the requisition, a voluntary contract for four voyages was made. Therefore, even if the full effect contended for be given to the suggestion and certificate, they do not establish that the vessel was operated under requisition during the intervening months, but merely that she was requisitioned on April 10th and was thereafter operated in the service and under the orders of the Admiralty, a service which the other evidence shows to have been simply a contract of carriage. The making by the respondents of such a contract of carriage was a breach of its charter with the petitioner.

FIFTH.

The respondents after the happening of the alleged requisition did not make efforts to secure the release of the vessel or to substitute other tonnage.

It is admitted by the respondent Hogarth (fols. 181, 182, 190, 191, 194) that no attempt whatever was made to secure the release of the *Baron Ogilvy* from requisition or to shorten the period of requisition, or to get the Admiralty to take, in place of the *Baron Ogilvy*, one of the other unrequisioned vessels of the same fleet. The Court below held

that the respondents were under no obligation to make any such effort (fol. 705). It is submitted that this was error. The law is plain that if a ship strands or is in collision or encounters any other similar obstacle, her owner must use all reasonable means to repair her and to make her ready to perform her charters as quickly as reasonably possible. There is no ground for applying a different rule to a case of requisition. If the owner can by reasonable efforts secure the release of the vessel or the shortening of the requisition period, he ought to do so. It is common knowledge that many such releases were secured on application, especially in the early part of the war. In the present case the owners made no effort whatever of this kind.

Nor did the owners make any efforts to substitute any other vessel. The charter is peculiar in its phraseology. It recites (fol. 449) that it is "made between J. H. Winchester & Co., Inc., * * * agents for owners of a first-class steam vessel owned by Messrs. Hugh Hogarth & Sons of Glasgow, and name of vessel to be declared on or before March 15th, 1915," etc. It appears from the evidence that the *Baron Ogilvy* was not owned by Hugh Hogarth & Sons, but by Hogarth Shipping Company, Ltd., although Hugh Hogarth & Sons were the agents and apparently the managers of the owner. There were other vessels not under requisition belonging to the same fleet. The Hogarth Shipping Company and the Kelvin Company, both controlled by Hugh Hogarth & Sons, owned between them about twenty vessels, of which eight appeared to have been under requisition at the time (fols. 139-140). Where the charter is for one vessel of a certain fleet and where the vessel named encounters such an obstacle, it

would seem that an obligation fairly arises to furnish another vessel within a reasonable time. Thus, in *Williams v. Vanderbilt*, 28 N. Y., 217, a steamship owner contracted to carry the plaintiff from New York to San Francisco, and the steamer *North America* was named as the vessel to perform the first stage of the voyage. She was lost, and the shipowner contended that that discharged him from his obligation; but the Court held that the identity of the vessel was a mere incident of the main object of the contract; that the contract could be substantially carried into effect by the use of another vessel, and that the shipowner was liable. It is submitted that the same ruling should apply to the present situation.

CONCLUSION.

It is submitted that the main questions arising in this litigation are of sufficient importance to call for the final determination of this Court, affecting as they do other pending litigations and many similar instances of broken charters, and involving as they do questions of international relations. As the law has been left by the Circuit Court of Appeals in this case, the act of a foreign government in requisitioning a vessel destroys the obligation of an American contract, although that contract was made in contemplation of that possibility, and although the parties failed to provide for it by any exception and on the contrary omitted the usual exception of restraints of princes. The hitherto well settled rule that prevention by foreign law is not a defense to a suit for breach of contract seems also to be overthrown. The question of the

standing of a foreign ambassador in our courts has come up in numerous cases in the lower courts and ought to be finally settled. It ought to be finally determined how far such an ambassador can conclude the courts of the United States by his certificate.

It is respectfully submitted that the writ of certiorari should be granted as prayed for in the petition.

Dated, New York, September 8, 1920.

JOHN W. GRIFFIN,
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1930

THE TEXAS COMPANY

Plaintiff

vs.

HOGARTH SHIPPING COMPANY, LTD., owner of the Steamship
"The Horn-Offley," and HUGH HOGARTH & SONS,

Defendants

MEMORANDUM AND BRIEF ON BEHALF OF
RESPONDENTS IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

JOHN M. WOOLLEY
HARRISON SHAFERHOUSE

Respondents

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SUPREME COURT OF THE UNITED STATES.

THE TEXAS COMPANY,
Libelant-Petitioner,

against

October Term,

1920.

No.

HOGARTH SHIPPING COMPANY,
LIMITED, owner of the British
steamship *Baron Ogilvy*, and
HUGH HOGARTH & SONS,
Respondents.

MEMORANDUM IN BEHALF OF RESPONDENTS
IN OPPOSITION TO PETITION FOR
CERTIORARI.

I. The opinion of Judge Hough, reported in 265 Fed. 375, and to be found in the Record, folios 700-714, pages 234-238, and affirmed *per curiam* without opinion, Record 253, folios 759 to 763, so fully refutes most of the points made by the petitioner in its petition that, for the convenience of the Court, it is here printed in full.

It is as follows:

HOUGH, J.:

“Reflection on this very interesting case, has led to the belief that it very fairly presents a question not peculiar to the admiralty, nor logically de-

pending for existence on a state of war,—although war presents the problem in an acute way, and one attracting more general attention than is commonly given to the events of peace.

“That question is, was the performance of the contract for the breach of which this action is brought,—prevented by the impossibility of performing it,—within the modern meaning of that phrase?

“Much discussion has been had concerning the efficacy of the certificate of the British Ambassador,—I do not now think it necessary to place judgment on any resolution of that query, and by some findings of fact will now show why,—and also reduce the case to the query of legal impossibility, by which phrase I mean an impossibility recognized by law as dissolving a contract.

“The parties executed a charter party, containing no ‘restraint of princes’ clause,—and (as I construe the document) no other clause or rider thereof authorized either party to invoke the line of decisions construing and enforcing that phrase.

“The charter named no special ship as the subject of hire for the voyage agreed upon; that was the only matter therein left open, but the moment the ship owners named the *Baron Ogilvy* as the vessel to perform that agreement, the charter became an ordinary voyage charter for that vessel and none other. She was for all legal purposes the ship and the only ship that would perform that particular agreement.

“Whether there was what libellants call a ‘valid requisition’ by the British Crown or not, is immaterial, in the sense that the point is not controlling. If I accept the certificate of the Ambassador, of course there was,—but I avoid without decision that question, now before higher author-

ity in the *Gleneden*,—and hold on the evidence that the British Government took and used the *Baron Ogilvy*, at and during the very time when the respondents had agreed to devote her to libelant's service, and further that such use was *in invitum*, except in the sense that all British ship owners were, I presume, patriotically willing to have their vessels used for war-like purposes,—if and when no other man's ship was available.

“In point of fact respondents did not cause or contribute to the taking over by Government of the *Ogilvy*, probably it was no great surprise, but libelant was equally aware at and after charter date of the possibility of requisition.

“As matter of law, respondents were not bound to use effort to prevent requisition, *i.e.*, to shift the burden to some other ship owner's shoulders in the interest of either themselves or libelants; and it was entirely within their right to seek (when governmental use was certain) the carriage of mules instead of something else, if mules promised less loss than other probable freight. This they did—nothing more.

“Finally, libelants were under no legal obligation to substitute another vessel for the *Ogilvy*, any more than they were bound to make a new charter with libelants. Legally the two propositions are identical.

“Thus the question for decision comes to this,—if the means and the only means whereby an American contract can be performed, is taken away by a foreign government, so that performance becomes physically impossible, is the contract dissolved,—so that losses or damages resulting from non-performance lie where they fell in the first instance.

"This is a large query,—but some of the elements stated are still immaterial or irrelevant. The fact that the interfering action was governmental and foreign, has been the groundwork or moving cause of libelant's action. That is, reliance is placed on decisions holding that foreign governmental *vis major* preventing performance does not excuse. No decision binding on this court goes so far as to state the rule as above argued for. Whether the English cases touching on the matter can be reconciled, I more than doubt, but am not much concerned with: but neither *Liverpool, &c., Co. v. Phenix*, 129 U. S. 397, nor *The Ada*, 250 F. R. 400, decided more than that one who in this country made a lawful contract, not in accord with the law of his own country, could not plead the foreign law to prevent his paying damages.

"That is a very different thing from destroying (in a very real sense) the subject matter of agreement. If it be true as I believe it to be, that for the purposes of this suit, the *Ogilvy* was or became non-existent, then the governmental element becomes as unimportant as the foreign, also the absence of the 'restraint' clause, and the question is really reduced to its lowest terms, viz.: whether the facts present a case of that 'impossibility of performance' which is and long has been a recognized and growing reason for dissolving a contract.

"That 'ordinarily' impossibility is no defence has been said often enough. It was a common law rule, and is consonant with the often referred to 'unmorality' of our immemorial custom. For lawyers' purposes it practically rests on *Paradine v. Jayne*, Aleyn 26,—for a modern application in *Rowe v. Peabody*, 207 Mass. 226.

But the defence is equitable, at least in a broad sense, and as equitable defences have made their way at law, so the doctrine of impossibility has advanced.

“Wars, and the demands and destructions of war, do not change the law in one sense, but in another they do, by multiplying and enforcing circumstances showing the need of change,—of modernization.

“Without war, there had come to be recognized (*inter alia*) two well known grounds of dissolution by impossibility,—destruction of subject matter without any one’s fault, and failure of contemplated means of performance. Under these heads the Great War has only furnished innumerable instances and applications. I think this litigation is one of them.

“For tracing through multiplied decisions, and attempting to recognize and display the dominant lines of argument, I have no time,—nor is that sort of thing useful in a court of first instance.

“Respondents brief consists frankly in Mr. Mackinnon’s pamphlet ‘Effect of War on Contract’; with its reasoning I agree,—though (as above indicated) it seems to me more philosophical to regard the matter as a growth of equity,—humanizing the common law.

“In admiralty we may recognize and enforce equitable principles without the strain that is often amusingly evident on the law side.

“The matter is one that has attracted comment for years in legal periodicals; reference to the volumes of *The Harvard Law Review* below noted* will give a key to the modern American cases.

* Vols. 14, p. 464; 15, pp. 63 & 418; 19, p. 462, and 12, p. 501.

“Of destruction of subject matter *Martin Emerich & Co. v. Siegel*, 237 Ill. 610, is a good example, and of failure of contemplated means *Clarksville &c. Co. v. Harriman*, 68 N. H. 374.

“The phrase ‘frustration of venture’ has obtained much vogue of late, and *The Allan Wilde* (U. S. S. C., Jan. 13, 1918) will increase it. To me it seems only an equivalent for and no improvement on, ‘impossibility of performance’, using impossibility in the practical sense so well illustrated by Maule, J., when he pointed out that a shilling *might* be retrieved from deep water, yet legally it was ‘impossible’ to do it,—because no sensible man would attempt the foolish job.

“Libel dismissed with costs.”

II. It will be seen from this opinion that the Court *did not* place its decision as to the fact of the requisition on the Embassy certificate.

Judge Hough specifically says that he avoids decision of that question because the same question was before this Court in the case of the *Glenden* and that he holds, *on the oral evidence* taken by commission, that the British Government took and used the *Baron Ogilvy* at and during the very time when the respondents had agreed to devote her to the libellant’s services and that such use was *in incitum*.

It is difficult to understand how the petitioner can properly contend, as in effect it does, that the Court of Appeals, having affirmed Judge Hough’s decision without opinion, must have proceeded on the certificate of the British Ambassador instead of following Judge Hough and deciding the case on the evidence.

As Judge Hough's decision was affirmed without opinion, the presumption is that the Court of Appeals approved his reasons as well as his result.

It is rendered almost certain that the Circuit Court of Appeals Judges did not decide this case on the certificate of the embassy, because of their decision made a few weeks previously in the case of *The Claveresk*, 264 Fed. 276, (1920), referred to at page 8 of the petition as *Earn Line Steamship Company vs. Sutherland Steamship Company, Ltd.*, in which it was stated that the Court did not find it necessary to rest its decision on the Ambassadorial certificate. It said, at page 280:

"The evidence, in the ordinary sense of that word—i. e. the competent and material testimony of persons duly sworn and papers produced—is sufficient for our purposes. * * *."

The instant case in which the petition for *certiorari* is sought, does not, therefore, involve a decision as to the effect to be given an ambassadorial certificate because the Courts below did not rest their decision on any such ground.

III. This petition is, in effect, an attempt to get this Court to reconsider the question which was before it in the case of the *Allanwilde Transport Co. v. Vacuum Oil Co.*, 248 U. S. 377 (1919), in which this Court held, in answer to a question certified by the Circuit Court of Appeals for the Third Circuit, that a contract without any exceptions of restraint of princes was frustrated by an indefinite embargo preventing the sailing of the vessel on the expected voyage.

IV. The facts in connection with the requisition have been concurrently found by both lower Courts in favor of the respondents and both Courts have held that, on evidence quite independent of the ambassadorial certificate, the requisition was in fact an act of the British Government against the wishes of the respondents and that the steamship *Baron Ogilvy* was used by the British Government under the requisition in such a way as to prevent her performance of the charter party with the petitioner and that the shipowner did not make a voluntary freight agreement with the British Government.

V. As a result, whatever may have been *argued* in the Courts below the *actual decisions* of the Courts below do not involve any question of public importance or novelty or any question on which there is any diversity of opinion between the various Circuit Courts of Appeal.

VI. In the event that this Court should desire to go into greater detail concerning the circumstances of the case which are disclosed in the record, they are further developed in the further brief which is annexed hereto.

VII. The case was correctly decided by the lower Courts.

VIII. The petition for *certiorari* should be denied.

Respectfully submitted,

JOHN M. WOOLSEY,

HARRISON LILLIBRIDGE,

Counsel for Respondents.

New York, October, 1920.

SUPREME COURT OF THE UNITED STATES.

THE TEXAS COMPANY,
 Libelant-Petitioner,
against

HOGARTH SHIPPING COMPANY,
 LTD., owner of the Steamship
Baron Ogilev, and HUGH HO-
 GARTH & SONS,
 Respondents.

October Term, 1920
 No.

FURTHER BRIEF FOR RESPONDENTS IN OPPO-
 SITION TO PETITION FOR CERTIORARI.

STATEMENT.

This case comes before this Court on an appeal from a decision and decree by Hon. C. M. Hough, dismissing the libel on the merits, with costs. 265 Fed. 375. 715-720.*

A. *The Pleadings.*

The libel, filed September 22, 1915, asked damages in the sum of \$50,000, for an alleged breach of a voyage

*Unless otherwise stated all references are to folios of the record.

charter party made at New York City on or about February 6, 1915, between The Texas Company, hereinafter referred to as the libelant, or appellant and the Hogarth Shipping Company, Ltd., hereafter referred to as the respondent, whereby the libelant agreed to charter a steamship, which was to be declared on or before March 15, 1915, for a voyage from Port Arthur, Texas, to South African ports, with a cargo of petroleum in cases, steamer to load April 15 to May 15, 1915. *Libel*, 4-6. *Charter Party*, 449-453, 456-457.

The libel alleges that the steamship *Baron Ogilvy* was named by the respondents on or about March 11, 1915, for the performance of the charter party and claims that the respondent's subsequent failure and refusal to send the steamship or any steamship to Port Arthur for performance of the charter party entitles the libelant to the damages claimed. *Libel*, 7-9.

The answer of the Hogarth Shipping Company, Ltd., admits that the *Baron Ogilvy* was named for the performance of the charter party on or about March 11, 1915, and alleges that she was accepted by the charterer as the steamship by which the charter was to be performed, *Answer*, 18; admits that the vessel did not perform the charter party and sets up as an excuse that on April 10, 1915, whilst the *Baron Ogilvy* was in London she was requisitioned by the British Government for Government purposes and that thereby the charter party became impossible of performance, both in law and fact, and the respondents were excused from performing it. *Answer*, 18-19, 29-32.

The answer also sets up that the provisions of a *special voyage charter clause*, putting the movements of the vessel under the orders of the British Government and providing for certain clauses to be included in all bills of lading, was a further defense to any claim for non-performance of the charter. *Answer*, 22-31.

The charter party did not contain the usual "restraint of princes" exemption and the defense, therefore, comes to this—

First: That the charter was frustrated by the Governmental act of the British Government, because that act as effectively destroyed the subject matter of the charter party, namely, the steamship *Baron Ogilvy*, as if she had been stranded, sunk or burned without the owner's fault.

Second: That the special voyage charter clause was the equivalent in effect of the usual restraint of princes clause.

The answer of Hugh Hogarth and Sons, filed January 17, 1916, admits that Hugh Hogarth and Sons are a co-partnership, but denies that they were the owners of the steamship *Baron Ogilvy*. *Answer*, 50.

The same separate defenses are set up as in the answer of the Hogarth Shipping Company, Limited. *Answer*, 51-68.

Apparently all claim against the co-partnership has been waived. *Statement of Libellant's Counsel*, 88.

B. The Facts.

The charter party was entered into at New York on February 6, 1915, and provided for the naming of a first class vessel, Class 100A1 at British Lloyds, on or before March 15, 1915. *Libel*, 6.

On or about March 11, 1915, the steamship *Baron Ogilvy* was named by Messrs. Hugh Hogarth and Sons to fulfil the charter party. *Hogarth*, 138.

In the last part of March the *Baron Ogilvy*, in performance of a prior voyage, arrived at London. Her owners sent the Master a copy of the charter party and instructed him, in case of inquiry by Government officials, to state that the vessel was already committed under the charter party to The Texas Company. *Hogarth*, 142.

On April 10th, while the *Baron Ogilvy* was still in London, the owners received the following telegram:

“Hogarth, Glasgow,
S. S. *Baron Ogilvy* is requisitioned under Royal Proclamation for Government Service. Transports.” *Hogarth*, 159.

This telegram was sent by Mr. Ernest Julian Foley, Assistant Director (Military) to His Majesty's Director of Transports of the British Admiralty. *Foley*, 244.

Notice that the *Baron Ogilvy* had been requisitioned and would be unable to enter upon or perform the charter party, was immediately sent to the New York representatives of The Texas Company. *Record*, 101.

The vessel was at once taken over by the British Government, and remained continuously in the service of the Government until October 20, 1915, making several trips from New Orleans, Louisiana, to Avonmouth, England, with mules. *Hogarth*, 162-3; *Foley*, 249; *Thompson*, 413-419. *Embassy Certificate*, 130.

C. *The Decision.*

Judge Hough held that after the *Baron Ogilvy* had been named "the charter became an ordinary voyage charter for that vessel and none other," 703; that there was in fact a requisition of the vessel by the British Government, 704; that it was not necessary to have recourse to the Ambassador's certificate for the proof of this because on the evidence the requisition was independently proved, 704; that the owner did not cause or contribute to the Government's taking the *Baron Ogilvy*, 705; and that after the Government took her the "respondents were under no legal obligation to substitute another vessel for the *Ogilvy* any more than they were bound to make a new charter with the libelants. Legally the two propositions are identical," 706.

Judge Hough, therefore, found that the owner was excused from the performance of the charter party by a supervening impossibility of performance, which amounted in effect to the destruction of the subject matter, i. e., the *Baron Ogilvy*, stating that he preferred the phrase "impossibility of performance" to the phrase "frustration of venture" as a description of what had happened to discharge the parties from liability. 708-713.

In pursuance of this opinion, a decree was entered on February 21, 1919, dismissing the libel with costs.

This decision was affirmed without opinion by the Circuit Court of Appeals for the Second Circuit. 759-763.

The decisions of the Courts below were correct and the petitioner's contentions are invalid for the following reasons:

I. ON THE REQUISITION OF THE STEAMSHIP BARON OGILVY THE CONTRACT OF CHARTER PARTY WAS FRUSTRATED AND ALL RIGHTS AND OBLIGATIONS OF THE PARTIES THEREUNDER WERE TERMINATED.

(1) *When the steamship Baron Ogilvy was named on March 11, 1915, to perform the charter party the contract became one relating to that particular vessel alone, as if she had been originally named therein.*

All other terms of the contract were agreed upon. This is apparent from the charter party. *Libellant's Exhibit No. 2, 448-474.*

It was so found by Judge Hough in his opinion below. He said, 703:

"The charter named no special ship as the subject of hire for the voyage agreed upon; that was the only matter therein left open."

Upon the naming of the *Baron Ogilvy* there was a meeting of minds on the only outstanding point of uncertainty.

The *Baron Ogilvy* was duly named on March 11, 1915, to perform the charter. *Hogarth*, fol. 138.

Far from disputing this fact, the libelant has made a sworn statement to that effect. *Libel*, fol. 7.

There is nothing in the pleadings or evidence to show that any objection was ever made by the libelant to the vessel.

The rights and obligations of the parties after March 11, 1915, therefore, related only to the *Baron Ogilvy* and the charter party became one for the service of the steamship *Baron Ogilvy*.

The owner would not have had a right thereafter to substitute another vessel for her.

As Judge Hough said, 703:

“* * * but the moment the ship-owners named the *Baron Ogilvy* as the vessel to perform that agreement, the charter became an ordinary voyage charter for that vessel and none other. She was for all legal purposes the ship and the only ship that would perform that particular agreement.”

In *Stoomvaart Maatschappij Nederlandsche Lloyd v. Lind*, 170 Fed. 918 (1909), a coal charter party gave charterer the option of three loading ports. He exercised the option by naming one, but finding no cargo there, sought to have the vessel sent to another loading port. To accomplish this purpose he made several offers to the owner, but they were not accepted. The vessel remained in the original port, where she eventually loaded.

In an action for demurrage by the owners, this Court reversed the decision below and granted the demurrage claimed for the entire period of the detention, on the ground that upon the naming of the port of loading the

charter became *an agreement to carry coal from that port only* and consequently that there was not any obligation on the owners to go to any other port to load. In the course of the opinion Judge Ward said at page 919ff. (Italics ours) :

“ * * * Accordingly, August 9th, the charterer, after communicating with Washington, ordered the steamer to go to Baltimore for her cargo. This they had no right to do, because the charter had become, *by virtue of their ordering her to Newport News, an agreement to carry from Newport News to Honolulu.* * * * It is, however, equally true that one party cannot compel the other affirmatively to do something which the contract does not require of him. Men generally being reasonable, such departures from agreements are usually accomplished amicably. Whether the ship owner in this case was reasonable or not in its refusal to shift to Norfolk, except upon its own terms, it had a right to refuse, because there was nothing in the charter compelling it to shift.”

It is submitted that there is not any distinction in this respect between an option to name a loading port and an option to name a vessel and that, therefore, the case just cited is a precise authority for Judge Hough's decision on this branch of the instant case.

(2) *The requisition was established by oral evidence taken under an open commission in England.*

Ernest Julian Foley was Assistant Director (Military) to His Majesty's Director of Transports at the time of the requisition of the *Baron Ogilvy*. *Foley*, 235.

The Director of Transports was the head of the department of the British Admiralty, which dealt with all matters of sea transport and requisition under the direction of the Lords Commissioners of the Admiralty, a branch of the executive government exercising the powers of the Crown in respect of naval matters. *Foley*, 235-237.

In accordance with the general practice, Mr. Foley sent a telegram dated April 10, 1915, and reading as follows, 244:

"8/48 O H M S Admiralty, London.

Hogarth, Glasgow. SS *Baron Ogilvy* is requisitioned under Royal Proclamation for Government Service.

TRANSPORTS."

In requisitioning vessels Mr. Foley was acting in behalf of the Lords Commissioners of the Admiralty. *Foley*, 259-260.

The requisition of the *Baron Ogilvy* was made pursuant to a request from the Military Department, for vessels to transport mules, *Foley*, 253-254, and the vessel was used for this purpose. *Foley*, 249; *Thompson*, 413-419.

If the requisition had not been complied with the vessel would have been taken by force. *Foley*, 245-246, 272.

Mr. Hogarth, the senior member of the firm of Hugh Hogarth and Sons, *Hogarth*, 135, testified that on April 10, 1915, he received a telegram from the Admiralty, requisitioning the *Baron Ogilvy*. *Hogarth*, 158-159.

He had had previous experience of the course pursued by the Government in requisitioning vessels, *Ho-*

garth, 160, for six of the twelve vessels of the Hogarth Steamship Company, Limited, of which his firm was manager, had been requisitioned. *Hogarth*, 140. The requisition of the *Baron Ogilvy* was the usual form. *Hogarth*, 160.

The telegram was considered as a formal requisition of the steamer, *Hogarth*, 173, and was confirmed in the subsequent dealings of the parties in respect of the arrangement for the carriage of mules. *Hogarth*, 173.

That it was not confirmed immediately by a letter of requisition was an error in office routine, due to pressure of work of the Admiralty. The failure to send the letter, however, would not have prevented seizure of the ship for non-compliance with the order contained in the telegram. *Foley*, 245-246, 274.

The failure to send a formal letter of requisition did not, in the opinion of Charles Robertson Dunlop, who qualified as an expert in respect of the prerogatives and powers of the English Crown, 578-579, affect the validity of the requisition under English law. 221, 294-295, 297-299, 300-301, 309-314.

In the case of the *Earn Line Steamship Co. v. Sutherland Steamship Co., Ltd.*, the Court, speaking by Judge Hough, dealt with similar facts, as follows:

“The second proposition (that the order was *ultra vires*,—meaning that it was not in accord with English municipal or constitutional law) is equally without support, even though we disregard the multiplied decisions, including our own, regarding the efficacy of the ambassadorial certifi-

cate. It is here proven without any reference to that document, that the act commonly called 'requisition' was governmental, and contained or expressed in a letter or order over the signature of the Secretary of the Admiralty. Further, that such letter or order was in assumed compliance with a proclamation dated 3d August, 1914, and an Order in Council dated 10th November, 1915. Whether in exercising this power the officers sending the telegram, signing letters and issuing orders were acting in strict accord with the municipal and constitutional law of the United Kingdom, is a question with which we cannot be concerned; for there is plainly proven a governmental act done within British territory, and we entirely agree with the court below that it is settled law that the act of another sovereign within its own territory is for our purposes legal of necessity. (*Hewitt v. Speyer*, 250 F. R. at 370, and cases cited.) The requisition of the *Claveresk* was a restraint of princes, lawful so far as we are concerned to inquire; * * *."

So here the requisition was proved as found by the Court below as a governmental act by ordinary evidence given in England entirely independently of the Embassy certificate.

(3) *The fact of the requisition as a governmental act of Great Britain was avowed by the British Embassy.*

The British Embassy certified under its official seal, as follows, 130, 131:

"IT IS HEREBY CERTIFIED that the British steamship *Baron Ogilvy* on April 10th, 1915, while lying

in the port of London, England, was requisitioned by the Government of the Kingdom of Great Britain and Ireland for Government service under the prerogative of the British Crown; that the period of said requisition was indefinite, and that after it became operative as aforesaid, the steamship *Baron Ogilvy* was continuously in the service of the British Government and was operated solely under the orders and direction of the British Admiralty until October 20th, 1915; that said steamship was of British registry and belonged to a corporation created and existing under the laws of Great Britain and Ireland, and that the requisition of said steamship was a Governmental act by the Government of Great Britain and Ireland."

The British Embassy's counsel appeared as *amici curiae*, offered, and with leave of the court filed a Suggestion which embodies the certificate and further submits that neither the fact of the requisition nor its effects should be inquired into by this court and that the court should decline to adjudicate the cause, upon the grounds that it involves the relations between the British Government and the owner of a British steamship, calls for a determination by a United States Court of the effect of Governmental acts of the British Government and involves an attempt to hold the respondent liable for acts of its Government. 124-129.

(4) *No act of the owner or its representatives and no failure to act on their part in any way caused or contributed to the requisition.*

There is not any evidence that the owner preferred to have its vessel requisitioned rather than to carry out

the charter party. On the contrary the evidence clearly shows that the owner desired to perform and was prevented from performing solely by the requisition which rendered performance impossible.

The Hogarth Shipping Company was endeavoring to keep its unrequisioned ships away from England, in order, if possible, to avoid further requisitions. *Hogarth*, 180.

The *Baron Ogilvy*, however, was compelled to come to London, in order to discharge cargo. *Thompson*, 400, 401, 432.

There was nothing left undone that could have been done to keep the vessel off requisition. *Hogarth*, 165. It simply could not be avoided for the Government wanted prompt ships. *Foley*, 243, 246-249.

The appellant argues, in effect, that the mule rates under the requisition were so attractive that the appellee made a voluntary arrangement with the British Government to carry mules in total disregard of its contract obligations to the appellant.

This is not the fact.

It is the fact that no arrangement for carriage of mules was made with the government until *after* the requisition had occurred.

It was obviously to the owner's interest to perform the charter with appellant and then to proceed from South Africa to Pagoumene, New Caledonia for a cargo of ore homeward on his private account. 496.

Mr. Hogarth states that he wished to carry out the charter with the Texas Company rather than to have the vessel requisitioned, for the profit under the charter would have been much greater than the profit under requisition.

In regard to this he testified on direct examination, as follows, 165:

“Q. How would your profits under that charter have compared with the profits that you actually made if you made any while the vessel was under requisition to the Admiralty? A. The profits under the oil charter would be infinitely more than the profits under the requisition.”

The loss is shown more in detail on re-direct examination (Italics ours). 211:

“Q. At the rate you were being paid per for mules by the Admiralty, what did you make per month? A. *A little more than we should have got at the 11s. Blue Book Rate, probably £600 or £700 per month.*

“Q. *As compared with £1,500 to £2,000?* A. Yes, carrying oil the steamer would have loaded 180,000 cases at 2s. per case and, roughly, that is £18,000, *she would have left about £7,000 profit on the oil voyage.*

“Q. And in three months of Admiralty requisition on the terms on which you were what was the profit? A. I can speak more accurately on Blue Book Rates, and this we considered a little better. On Blue Book Rates she would have made £500 a month, but we took a lot of responsibility and trouble in providing muleteers and quarters and we got £100 more.

“Q. *Did you make a considerable loss by having the vessel requisitioned?* A. *A very great loss.*

“Q. It is suggested you refrained from taking measures to get the *Baron Ogilvy* free because it was to your interest in some other way, to have

her requisitioned. Is there a word of truth that your personal interest or the interest of your company came into the matter at all? A. No."

The fact that the owners would have had to cover war risks under the charter, whereas the Government bore the war risk under the requisition, was allowed for in the testimony above quoted. *Hogarth*, 213-214.

The libelant in his brief has attempted to refute this evidence by Mr. Hogarth that the carriage of mules under the requisition represented a loss to him as compared with what would have been earned by the carriage of oil under the charter which is the subject matter of this suit.

The difficulty with the appellant's position in this regard is that it is attempting to attack direct evidence by figuring on estimates of its own.

There is not anywhere in the evidence any statement as to the expense for putting in the mule fittings, for attendance on the mules, fodder, electric-light, wireless telegraphy installation, etc. In other words, the libelant has attempted to create a comparison in which there are a number of unknown elements on both sides. For example, it is not known to how many ports the steamship *Baron Ogilvy* would have been ordered by the Texas Company in the event that she had carried the case oil.

It was provided in the charter that the *Baron Ogilvy* was to have half a cent extra per case on the whole cargo for each additional port and an option was given to discharge it at from one to five ports.

It is not known how many mules died on the voyages of the *Baron Ogilvy* thus causing loss of the gratuity given for mules landed alive.

There is not any definite proof as to what the expenses under the Texas Company charter would have been, nor what the expenses under the Government requisition were.

If, therefore, the gross monthly freight earnable under the Texas Company charter be represented by the letter A, and the expenses under that charter by the letter X, and the gross monthly earnings for the carriage of mules for the Government be indicated by the letter B and the expenses by the letter Y, it follows that, inasmuch as we do not know what the expenses X or the expenses Y amounted to from any evidence which is in the record, the relation between A minus X and B minus Y cannot be known.

Of course, it had already been decided in the Circuit Court of Appeals for the Second Circuit that the fact that a charterer may earn more out of a requisition than he was earning under a charter party is not material on the question of frustration. *The Claveresk*, 264 Fed. 276, (1920).

The purpose of the appellant's argument in the present case in respect of the alleged earnings by the carriage of mules for the Government as compared with the earnings under the Texas Company charter is obviously made as a background for a claim that the requisition was secured by connivance of the owner for its own benefit.

This is clearly shown by the proof, documentary and otherwise, not to have been the fact.

As this claim of connivance has been stressed by the appellant it is necessary to go into the correspondence in some detail to illustrate the soundness of the appellee's position in this regard.

The good faith of the owner of the *Baron Ogilvy* is illustrated by its letter of the 25th of March, 1915 to the Captain. 482-486. In it the owner says, 483-485:

"We have, of course, been greatly disappointed at your being ordered to London as we should have much preferred your going to the Southern French ports and getting out of the submarine area as well as avoiding the very great risk of being requisitioned for Admiralty service. We are very much afraid of this latter, as at present the Admiralty are urgently in need of vessels of your type for their Mediterranean expedition.

You are declared under an open charter for a cargo of Oil from Port Arthur, Texas, to the Cape ports. The copy of the charter is enclosed herewith, and if you are visited by any Government Officials you can inform them that the vessel is chartered from the States to the Cape and if necessary exhibit the charter party."

The Captain acknowledges receipt of this letter and the charter party under date of March 28th. 488.

On March 30th, the owner replied to the Captain's letter of March 28th, which dealt with various details of his previous voyage and indicated to him again its intention to carry out its South African voyage for the Texas Company, saying, 496:

"Our present intentions are to send you from the Cape Ports to Australia for bunkers and load

home under contract from Pagoumene (New Caledonia) to Glasgow."

Captain Thompson confirms the orders that had been given him by the owner as to the voyage for the Texas Company. 403-404. He also testified that he made up his store list for a voyage from Port Arthur where he was to load for the Texas Company. This list, he says would have been different from the store list out of New Orleans. 437-438.

Under date of March 31st, the owner received a telegram from Messrs. Harley & Company confirming their fears that the vessel might be requisitioned, reading, 498:

"Admiralty Note *Baron Ogilvy* in London may require requisition her. Please post plan. Say when expect discharged."

The owner wrote to Messrs. Harley & Company under date of March 31st, as follows, 499-500:

"We have your telegram of date from which we take it that the Admiralty have apparently been questioning you regarding this vessel. Please point out to the Admiralty that we have already with the *Baron Jedburgh*, eight vessels on Government service, a larger proportion of our tonnage than we are entitled to give, and that besides, this steamer is chartered for a cargo of oil from the States to the Cape Ports and thereafter from New Caledonia to the U. K. Continent. We cannot say when she is likely to be discharged."

On the 1st of April, 1915, the owner received a letter from a firm called Hogg & Robinson, asking for a ready

vessel capable of carrying 4000 to 6000 tons, measurement, of hay, which it was stated the Director of Transports wished for Government service. 501-502.

Under date of April 1st, the owner also got a letter from Messrs. Harley & Company in which the owner's letter to Messrs. Harley & Company of the 31st of March was acknowledged, and in which Harley & Company pointed out that the fact that the steamer was already chartered from the States to the Cape and thence from New Caledonia to the United Kingdom would not be of any concern to the Admiralty if the country needed the steamer. 505-506.

Under date of April 2nd, Hogarth replied to the letter of April 1st from Hogg & Robinson and suggested that Hogg & Robinson should call the attention of the Director of Transports to the number of vessels which had been requisitioned from the Hogarth fleet and to important contracts which they already had for the carriage of copper ore. 507-508.

Under date of April 2nd, Hogarth wrote to Messrs. Harley & Company advising them that Hogg & Robinson had been asking information for handy tonnage for the carriage of hay and that they had suggested to Hogg & Robinson that they should call the Director of Transports' attention to the heavy commitments which Messrs. Hogarth had for any handy vessels. 510-511.

Under date of April 3rd, Hogg & Robinson acknowledged Messrs. Hogarth's letter of April 2nd and further urged the Government's requirement for prompt vessels for the carriage of 4000 to 6000 tons of hay. 513.

Under date of April 6th, Hogarth replied to Hogg & Robinson's letter of April 3rd and advised them that it

had not any vessels in England, or shortly due there, with the exception of the *Baron Ogilvy* which was then in Milwall Dock, and they added, 515:

“This vessel is, however, chartered to load in the States.”

Messrs. Hogg & Robinson replied under date of April 7th that the *Baron Ogilvy* was suitable for the hay requirement, and desired to be kept posted as to her movements, adding that they understood from the Milwall Dock Authorities that she would possibly be clear, that is her cargo would be discharged, by Wednesday following. 518.

On the 9th of April Hogarth received two telegrams from Harley & Company.

The first which was sent at 1.13 p. m. and received in Glasgow at 1.54 p. m., read, 525:

“*Baron Ogilvy*. We regret to inform you Admiralty say must requisition this steamer for Country's need. Telegram of Requisition is being prepared and you will receive same later.”

The second telegram was sent from London at 1.45 p. m. and received at Glasgow at 2.16 p. m., reading as follows, 520:

“*Baron Ogilvy*. Referring to Admiralty Notice Requisition We believe could induce them take her instead for three or four trips New Orleans, Avonmouth or Liverpool, Fourteen pounds namely Thirteen pounds ten and ten shillings gratuity. Shall we try to do so.”

On April 9th, Messrs. Hogarth & Company acknowledged these two telegrams from Messrs. Harley & Company and, 527, confirmed the telegram they sent in reply to the two telegrams from Messrs. Harley & Company. They wrote as follows (Italics ours):

“We have intimated to Hogg & Robinson that the vessel is committed for further business but probably the requisitioning arrangement which you refer to will be that of another department and *it will be as well to make them clear, that the vessel is fixed for oil from the States to the Cape and thereafter from New Caledonia home. Meantime, of course, we have not received a requisitioning telegram and cannot move in the matter.*”

Certainly this was a perfectly justifiable position and showed perfect good faith on the part of the owner Hogarth.

On April 9th Messrs. Harley & Company also wrote three letters to Messrs. Hogarth.

In the first of these, 529-531, they stated that they were sorry to advise Messrs. Hogarth that the Admiralty had informed them that the *Baron Ogilvy* was required for the needs of the country and that a formal telegram of requisition was being prepared which would be received in due course. They expressed regret that the Admiralty had to take the steamer and a belief that the Government would not disturb any steamer's commitments if they could avoid it.

In the second letter they referred again to the notice of requisition by the Admiralty of the *Baron Ogilvy* and

said that they believed it would suit the Admiralty's purpose just as well if they were to charter her from New Orleans to Avonmouth or Liverpool for mules at Thirteen pounds ten shillings and ten shillings gratuity for three or four trips, and also stated that they believed if they were authorized to approach the Admiralty they could arrange this use of the vessel, 522-523.

A third letter of April 9th Messrs. Harley & Company, 536-537, acknowledged Hogarth's telegram dealing with the Hogg & Robinson situation and replying to the two telegrams of April 9th received from Harley & Co.

In this letter Messrs. Harley & Company said that they did not know why Messrs. Hogg & Robinson were troubling Messrs. Hogarth, that the department of the Admiralty which Hogg & Robinson followed was quite distinct from the department which Messrs. Harley & Company were following, and added that they understood that the requisitioning of the steamer *Baron Ogilvy* was absolute. They enclosed a copy of the requisition terms. They also stated that they had pointed out to the Admiralty earlier in the day that the steamer was under commitment for other employment, that the Admiralty replied that they could not help that as they required the boat and that any claims that might subsequently come forward would have to be met in the usual manner. 536-537.

On the 9th of April Messrs. Harley & Company wrote, without any authority from Hogarth, a letter to the Director of Transports referring to his verbal notice of requisition and suggesting that possibly the vessel could be chartered for the conveyance of mules on the same terms as the other *Baron* steamers which were operated in that trade. 532-534.

On April 10th a telegram of requisition was sent from the Admiralty at 8.48 a.m. to the owner, reading as follows, 538:

“S.S. *Baron Ogilvy* is requisitioned under Royal Proclamation for Government service”

“Transports”

On April 10th Messrs. Hogarth wrote Messrs. Hogg & Robinson, advising them that the vessel had been requisitioned, that she was the *ninth* vessel of their small fleet then on Government service, and hoped that the Admiralty would see fit to leave the rest of their fleet alone as they did not know of any firm of tramp shipowners with the same proportion of vessels on Government service as they had. 540-541.

Under date of the 10th of April, Messrs. Harley & Company wrote to Messrs. Hogarth & Company dealing generally with the situation and explaining how Messrs. Hogg & Robinson had been injected into it. They added, 544 (Italics ours):

“You will now have received a formal telegram from the Admiralty requisitioning this steamer under Royal Proclamation for Government Service.

“The Admiralty have also sent us a similar telegram.

“As they had not sent this message off last evening when we saw them *they could not proceed to discuss the alternative suggestion that we have in hand*, but we are seeing them at noon today and will advise you further.”

This clearly indicates not only that the Admiralty insisted on requisitioning the vessel first and then negotiating as to trades afterwards but also that there was not any arrangement made with regard to the carriage of mules until *after* the vessel had been taken by the Government under requisition and that then, as the District Court suggests, the owner proceeded quite properly to arrange to make as good a freight as they could out of the Government business.

This arrangement was subsequently consummated through Messrs. Harley & Company in a series of letters and telegrams. 546-560, 572-578.

The testimony of Mr. Foley, of the Admiralty, confirms the facts of the situation as it has been above outlined.

He testified, 242-243 (*Italics ours*):

“Q. Before the date when the vessel was actually requisitioned had you any request from the owners or Messrs. Harley that she should not be taken?

(Question objected to.)

A. We had.

Q. What treatment, in effect, did this question receive? A. We did as we did with everybody; we listened to what they had to say and did our best to avoid hardship, but *we needed the ships, we needed the prompt ships, we needed the suitable ships, and therefore we took them.*

Q. In those circumstances was it found essential to requisition the *Baron Ogilvy*? A. Yes. This ship was particularly suitable for our services *we wanted her for the carriage of mules.*”

Again, 270-273, he testified. (Italics ours):

“Q. Was not this a case in which it was happily possible for the parties to mutually agree upon the terms of engagement? A. No, not from my point of view, the reason being that we were dealing with a very large number of ships and you probably know that negotiations to arrive at a rate to be agreed between two people are a lengthy and troublesome process; there was no possibility of doing it.

Q. You had already, in the case of other ships belonging to this same line, arrived at certain conditions upon which they were being worked? A. Quite.

Q. And in respect of this ship you were able to agree that the same conditions should apply? A. Quite.

Q. It was not, therefore, either difficult or a lengthy business to come to a mutual agreement as to the terms of engagement with regard to this particular vessel? A. *It was not a difficult or lengthy business when I had requisitioned her, but to conclude a bargain with them on the basis of a free ship would have been a difficult and lengthy business. I could not have done it; the ship had a charter she could not break. It was impossible for myself and the owners to come to an agreement for the use of that ship. I had to take the ship by the exercise of the Crown's powers. Quite obviously there was no question of discussing terms with the owner; he had a prior engagement for the ship.*

Q. Had you not, as a matter of fact, given some intimation to Messrs. Harley before the 10th April that you would probably be requiring this vessel?

A. Yes, I think we had.

Q. Before the 9th April? A. I think so; our need was very well known; our whole purpose of getting the particulars of those ships was that we should be up to date in their position and so forth.

Q. Had you not made it plain to them that if this vessel was not chartered to you on the terms on which you were already employing the other vessels of this line, you would have to requisition her? A. *Certainly not. May I point out again there is no question of charter; the owners could not charter the ship to us. They had a charter for the ship.*"

And again, 279-283, he testified. (Italics ours):

"Q. Just to get the sequence of events, about this 9th and 10th April, it would rather appear—tell me if I am right—that on or before the 9th April you had verbally requisitioned the *Baron Ogilvy*. Would you look at the first letter to which my friend referred? A. 'With reference to your verbal notice of requisitioning this steamer.' *We told Messrs. Harley obviously that we were going to take that steamer.* The actual telegram sent on the 10th I think was at 8.18 A.M., very early, so the decision was come to on the 9th. As Harley was in constant attendance at our office, he would have been told on the 9th.

Q. Then there was an arrangement made as to the terms upon which the vessel should run for the government? A. Quite.

Q. It is referred to there as chartering her? A. Yes.

Q. You were one of the parties to that arrangement? A. Yes, I was.

Q. Was that, in your view, a voluntary charter of the vessel by the owners to the Director of

Transports? A. Not voluntary in any sense except this, that he was not bound *after the ship was requisitioned* to accept these conditions as to giving us fittings and attendants, and forage and so forth.

Q. In other words, you had a right, as you told us, by the prerogative of the Crown to requisition a ship? A. Which I exercised.

Q. But had you any right to require the owner to alter her or put up fittings? A. I had no right to do that.

Q. As I understand, for the carriage of the mules, that would have to be done by the Admiralty? A. That would have to be done by the Admiralty.

Q. And it suited you to have that done by the owners instead? A. It suited me to pay Hogarths, as my agents, to do it.

Q. Supposing you had not come to an arrangement as to the terms on which this vessel was to run on these mule trips, what could have happened; would Hogarth have had his vessel free? A. No, *I should have taken the ship, had her fitted myself, and he would have been paid the Blue Book rate of hire and nothing more, in addition to which there might have been his liability for punishment.*

Q. I dare say they have heard in the States, as we have here, of what we call in this country Hobson's choice? A. Yes.

Q. Would it be right or wrong to suggest that with regard to this ship, so far as Messrs. Hogarths were concerned, it was rather a case of Hobson's choice? A. It was entirely a case of Hobson's choice."

Mr. Hogarth also testified as to his desire to carry out the Texas Company contract. *Hogarth*, 141-142.

Judge Hough, therefore, dealt with the situation below entirely correctly when he said, 705-706:

"As matter of law, respondents were not bound to use effort to prevent requisition, *i. e.*, to shift the burden to some other ship owners' shoulders in the interest of either themselves or libellants; and it was entirely within their right to seek (when governmental use was certain) the carriage of mules instead of something else, if mules promised less loss than other probable freight. This they did—nothing more."

It is submitted that the owners' attitude was unexceptionable throughout, and that with his ship in London—in the Lion's mouth, as it were,—a clearer case of Governmental *vis major* against them can with difficulty be imagined.

We can leave it with the remarks of Mr. Foley who knew all about the situation and who aptly said, on cross examination when questioned about the negotiations for the carriage of mules, 265-268:

"Q. Do you still say, in the light of the language used in those three letters, and in that telegram that this vessel was not chartered to you by her owners? A. Surely the question is, what exactly you mean by chartered? *If you mean I made an agreement with the owners after the requisition, certainly, but if you mean the owners chartered to me freely in the market sense of the term chartered, but that they had a free boat that they*

offered at the market rate, and I took it, no, nothing of the sort.

Q. Is not that what happened, that you sent to the owners the telegram of the 10th April, and the owners under the pressure of that telegram offered to charter the vessel to you, and you accepted the offer? A. It is rather difficult to answer the question, you put it rather curiously, if I may say so; *I requisitioned the ship and afterwards the owners and myself agreed to a certain basis of payment; that is really the way it is in my mind.*

Q. That is your view of the transaction? A. That is my view of the transaction.

Q. You would not say that the language employed in the letters was inaccurate? A. No, because after the requisitioning telegram went a certain offer was made to us, and we accepted it, *but all this is the sequence of the requisitioning of the ship.*

Q. Is not this just one of these instances in which the shipowner has bargained with you on the basis that you had the big stick? A. No, *the point is the shipowner has his ship taken from him; then all he can do as a prudent shipowner is to make the best he can of it with us. I had something I wanted from him outside the ordinary requisition and it suited him to take that line.*

Q. The result of the arrangement was that you obtained something from him you would not have obtained if the vessel had been requisitioned in the ordinary way? A. Quite, that is so."

(5.) *After notice of requisition the owner was not under any duty to try to resist the requisition or to get the vessel released.*

The vessel was taken under an undoubted war power of a Sovereign Government. This being so, it can hardly be contended that because of private contract with a foreigner the British owners were under legal obligation actively to oppose their Sovereign in order to carry out their private contract.

In the case of *Earn Line Steamship Company v. Sutherland Steamship Company, Limited*, 254 Fed. 127, the question involved the requisition of a vessel under a time charter, where the profits to the owners were greater under the requisition than under the charter. In dealing with a criticism by charterers of the owners' compliance with the telegram of requisition, Judge Learned Hand, in 254 Fed. at p. 129 said:

"Nor am I impressed with the suggestion that the formal requisition followed the original telegram only because of the respondents' compliance in its telegraphic answer. It appears to me somewhat naive to suppose under such circumstances as then existed that the British Admiralty made requisitions dependent upon the consent of the ship owner. That the respondents were eager enough to have their ship taken is clear enough, as well as is their desire to get rid of a charter then become onerous and to substitute the Admiralty hire, but that this attitude of his had any effect upon the result seems to me a thin supposition."

Upon appeal of that case, this Court, in an opinion by Judge Hough, discussed the possibility of resistance by an owner to the requisition of a vessel, and said in part, 264 Fed. 280 (Italics ours):

“Thus the question is reached whether in obeying the order, Sutherland yielded to that restraint of princes excepted in the charter party.

“It is here to be noted that the charter was not a demise. Subject to the chartered rights of Earn Line, the ship-master was the owner’s master, and the ship, through that master, in the owner’s possession. (*The Santona*, 152 F. R. at 518). Therefore in legal contemplation the vessel was taken or received from the owner and not from the charterer.

“On the question last stated appellant offers two propositions: (1st) The clause refers merely to physical restraint of the ship; an order to the owner is not within its meaning. (2nd) The order was “*ultra vires*”;—meaning that it was not in accord with English municipal or constitutional law.

“The first proposition is untenable. In times past, when a vessel left port, she disappeared from her owner’s ken; there was no means of communicating with her except by other ships like her, and electricity and steam did not keep owner and ship in constant touch. In such times force, governmental or other, was more swiftly and more usefully exerted on the ship than on the owner. Now it is more efficacious to act on the ship through the owner, and (so to speak) requisition or commandeer the owner, and through him his vessel; putting upon that owner the same necessity of obedience that in former days was exercised on the master wherever the ship might be. The theory has not changed, but the method of application has been modernized. The fundamental essential of a restraint of rulers is that the restraining act should be governmental (*Northern etc., Co. v. American, etc., Co.*, 195 U. S. at 467 *et seq.*). That the restraint need not be physical was in effect held in

The Styria, 186 U. S. at 18; and see cases cited in *The Athanasios*, 228 F. R. 558. The matter is fully covered by Lord Reading in *Sanday v. British, etc., Co.*, 2 K. B. (1915) at 802; in which case, on appeal to the House of Lords, it was said (in affirming the judgment) that "the circumstance that force was neither exerted nor present (is immaterial) for force is in reserve behind every state demand"; and it was added in substance that it would be "a strange law" which required one to resist "till the hand of power was laid upon him, an order which it was his duty to obey. If it were an order which he was not bound to obey and which he might have successfully resisted either by violence or by process of law, a question might arise * * *."

"The evidence here is plain that resistance was impossible; all that Sutherland could have done would have been to say "I refuse to order my captain to report to the Admiralty agents; I prefer to leave my ship in the service of a neutral charterer." The supposed case need not be pursued;—to the probable and proper punishment of such an act. *No citizen or subject is by lawful private contract either required to or justified in proceeding to such lengths in resisting or evading the compulsion of his government.*"

A disregard of the requisition when the vessel was in London to the extent of attempting to send the vessel to Port Arthur in defiance of the requisition would not have been beneficial to the charterer, because the vessel would have been taken in any event. *Foley*, 246.

Incidentally there can be little doubt but that the owner would also have been subject to heavy penalties

and possibly the loss of all remuneration for the use of its ship.

In *Gans Steamship Line v. the British Steamship Frankmere*, 262 Federal 819 (1920), a similar question came up for decision in the United States District Court for the Eastern District of Virginia. In that case the vessel was at Genoa when requisitioned. The compensation received from the Government under the requisition of a time chartered ship was greater than that which would have been received under the time charter in force at the time of the requisition. Claim was made for this excess as damages. Judge Waddill sustained the requisition as an exercise of Governmental *vis major* and held that the charter was frustrated.

Concerning the efforts made in this instance to prevent requisition or secure the vessel's release therefrom, Mr. Foley testifies as follows, 246, 249:

"Q. I do not know whether any representation in fact was made to you by either the owners or Messrs. Harley & Company, their agents, after you had requisitioned her in the way you have stated, to have her released?

(Question objected to.)

"A. That is very difficult to say. I had constant interviews with Messrs. Hogarth and Messrs. Harley in which they pressed for the release of steamers. It was at that time a constant plea from all ship owners, and Messrs. Hogarth were not less persistent than others.

"Q. Having regard to the nature of the employment which if the vessel had not been requi-

sitioned she was about to take up, that is to say the carrying of oil from Texas to Cape ports, would a request by the owners or Messrs. Harley & Co. for her release have resulted in her being released?
A. Certainly not.

“Q. Was the carriage of a cargo of oil from Texas to Great Britain regarded by the Transport Department as being in the interest of the British Empire at war? A. I can hardly answer that. What happened was that it was not considered anything like so requisite as the carriage of mules from the United States to this country for the purposes of war. The carriage of oil to the Cape was of importance, but it was not comparable with the carriage of mules to this country, that is to say, military importance.”

The argument that it was unfair of the Government to requisition more of the Hogarth steamers because they had already requisitioned such a large number, was frequently brought to the attention of the Admiralty. *Hogarth*, 188.

In the cases of the requisition of the *Baron Yarborough* and the *Baron Kelvin*, which were released from requisition, the vessels were under charter to carry pyrites, a cargo which was of prime importance to the Government. *Hogarth*, 189-190. The carriage of petroleum to South African ports by the *Baron Ogilvy* did not furnish a similarly cogent argument for her release.

In this regard Mr. Hogarth testified, 189-191:

“Q. Now, I suggest that you might have taken up this matter of the *Baron Ogilvy* much more energetically if you had been really anxious to discharge this contract. Is it your statement that

you could have done more than is represented by these few letters? A. Nothing more, in my opinion, would have had any effect. I had no argument with which to go to them. It was not the government interest to carry a cargo of oil, whereas it was very much to the government interest that we should go on carrying cargoes of pyrites to this country."

and again 210-211:

"Q. Have you had experience of endeavoring to get vessels released by the Admiralty? A. Yes.

"Q. Have you considered you had any argument worth putting forward to the Admiralty in respect of the *Baron Ogilvy* to get her released? A. No, I considered I had no argument; I could not plead it was in the national interest that a cargo of oil should be carried from the States to the Cape."

Mr. Foley testified to the same effect, *Foley*, 248:

"Q. Was the carriage of a cargo of oil from Texas to Great Britain regarded by the Transport Department as being in the interests of the British Empire at war? A. I can hardly answer that. What happened was that it was not considered anything like so requisite as the carriage of mules from the United States to this country for the purposes of war. The carriage of oil to the Cape was of importance, but it was not comparable with the carriage of mules to this country, that is to say, military importance."

(6.) *The effect of the Act of the British Government was to frustrate the charter party which is the subject matter of this suit and to discharge both parties thereto from all further obligations thereunder.*

Under the provisions of Clause 8 of the charter party, the lay days for loading were not to commence before April 15, 1915, and if the vessel was not ready to load by 2 p.m. on May 15, 1915, the charterers had the option of cancelling. 456-457.

In other words, this was a charter party for vessel's delivery in April-May, 1915, at Port Arthur and for a voyage immediately thereafter to South Africa. It is shown by the evidence that the Texas Company had commitments for the carriage of the cargo which they contemplated sending by the *Baron Ogilvy*. They subsequently lifted the cargo on the *Vimeira*, which was chartered April 14, 1915, to carry the cargo in question. 104, 445.

It is interesting to note that the *Vimeira* charter also was for loading *between April 15 and May 15, 1915.* 445.

It is an uncontroverted fact that the steamship *Baron Ogilvy* did not get out of Government service until October 20, 1915. *Embassy Certificate*, 131; *Foley*, 253.

Thus the requisition of the vessel occupied many months more than the voyage under the charter of the Texas Company would have occupied and the commercial use of the vessel during the period when the charter of the Texas Company would have been performed was rendered entirely impossible by the act of the British Government.

At the time of the requisition, therefore, the release of the vessel during the period when the Texas Company charter under ordinary course would have fallen to be

performed was not expectable. The owner took this position at once in communicating with the Texas Company and advised the Texas Company under date of April 12th of the fact that the vessel had been requisitioned and would not be able to carry out her charter. 102-103.

The intimation contained in the libellant's brief that the requisition might have been only for a few weeks is entirely misleading because the suggestion of a short requisition was involved in a letter from Hogg & Robinson regarding a requisition for service in the carriage of hay, 502, whereas what the Government really wished the vessel for was the carriage of mules, and that was the trade for which she actually was used. Prompt ships were urgently needed, the *Baron Ogilvy* was a prompt ship and the Government took her irrespective of her private commitments. *Foley*, 242-243.

The Admiralty used the *Baron Ogilvy* for trade from New Orleans to Avonmouth, which was an entirely different trade from the trade which was contemplated in the Texas Company charter namely from Port Arthur to South Africa.

A more perfect case of the frustration of a venture by *vis major* would be difficult to find. *

Great emphasis is, apparently, placed by the appellant on the fact that the charter party in the present case did not contain the usual restraint of princes exemption.

But an exception has not anything whatever to do with the doctrine of frustration.

An exception may be an excuse for the temporary non-performance of a contract which is in existence, but the

frustration of a contract means that the contract is entirely destroyed by some supervening occurrence rendering it impossible of performance.

In the present case, the contract was entirely destroyed because the requisition was the interference of a *vis major* and the period of requisition was indefinite; thereby the subject matter of the contract, *i. e.*, the use of the *Baron Ogilvy* for a voyage from Port Arthur to South Africa commencing April-May, 1915, was rendered wholly impossible. *Embassy Certificate*, 130; *Requisition Telegram*, 538.

Annexed to this brief is an appendix which contains a list of cases dealing with the frustration of charter parties and other contracts.

We shall now discuss some of these cases which seem peculiarly to apply to the situation in the present case.

The decision of the Supreme Court of the United States in the case of the *Allanwilde Transport Company v. Vacuum Oil Company*, 248 U. S. 377 (1919) is a flat decision supporting Judge Hough's decision in the present case.

In that case the *Allanwilde*, a sailing vessel, loaded at New York for Rochefort, France, a port in the war zone, and sailed September 11, 1917. Her charter party did not contain any exemption of restraint of princes.

On September 28th, while the vessel was at sea, unknown to the Master, a Government ruling became effective, preventing the clearance of sailing vessels bound for the war zone.

Owing to severe weather the vessel was compelled to put into New York for repairs, after which she was prevented from continuing her voyage by the Government ruling.

The Circuit Court of Appeals for the Third Circuit certified the following questions to the Supreme Court:

“(1) Was the adventure frustrated and was the contract evidenced by the charter party and by the bill of lading issued to the oil company, dissolved so as to relieve the carrier from further obligation to carry oil?

“(2) Whatever answer may be given to the first question, did the contract thus evidenced justify the carrier under the facts stated in refusing to refund the prepaid freight?”

The Supreme Court answered both questions in the affirmative.

In delivering the Court's opinion, Mr. Justice McKenna said at pages 385-6 (Italics ours):

“It is urged, however, that there is no provision in the contract (charter party and bill of lading) of the Oil Company excepting ‘restraint of princes, rulers and peoples’ and that, therefore, the carrier was not relieved from its obligation by the refusal of clearance to sailing vessels. *And it is further urged that such embargo was at most but a temporary impediment and the cargo should have been retained until the impediment was removed or transported in a vessel not subject to it. We cannot concur in either contention. The duration was of indefinite extent. Necessarily, the embargo would be continued as long as the cause of its imposition—that is, the submarine menace—and*

that, as far as then could be inferred, would be the duration of the war, of which there could be no estimate or reliable speculation. The condition was, therefore, so far permanent as naturally and justifiably to determine business judgment and action depending upon it. The Kronprinzessin Cecilie, 244 U. S. 12."

That the doctrine of frustration is not affected by the presence or absence of exceptions is also shown in the case of *Shipton-Anderson & Co. v. Harrison Brothers Co.*, 21 Com. Cas. 138 (1915).

In that case the sellers sold to the buyers by a contract dated September 2, 1914, about 42,800 centals of winter wheat ex S. S. *Dalecrest*, ex grain storage, payment cash within seven days against transfer order.

There were not any exceptions in the contract.

At the time when the contract was made the sellers were the owners of a parcel of 42,800 centals of winter wheat which had been discharged out of the steamer named and was then lying in a grain warehouse. No transfer order was given.

On September 4th the sellers were verbally informed that the wheat had been requisitioned by the British Government and on September 8th a written requisition was sent them. The buyers claimed damages from the sellers for non-delivery. Arbitration ensued in pursuance of the rules of the Liverpool Corn Trade Association and the arbitrators referred certain questions in the case to the Court of Kings Bench in pursuance of the provisions of the British Arbitration Act.

The Court held that inasmuch as the delivery of the wheat by the sellers to the buyers had been rendered im-

possible by the requisition, the sellers were excused from performance of the contract in spite of the fact that the contract did not contain any exception.

The case was heard by Lord Reading, Mr. Justice Darling and Mr. Justice Lush.

After determining that title had not passed to the buyers by reason of the fact that there had not been any delivery of warehouse certificates, Lord Reading proceeded to discuss whether the sellers were excused from performance of the contract owing to the requisition and called attention to the fact that the contract was absolute in its terms, and then said, at page 141 :

“No doubt there are cases on either side of the line, and the application of the principles of law are matters of some nicety and difficulty, but I have come to the conclusion that in this case the sellers are excused from performance of the contract, and that the contract must be taken as an undertaking by the sellers to deliver the goods subject to the condition, that if the British Government requisition the goods and render it impossible for the sellers to perform their contract they should be excused from the performance of it. The conclusion at which I have arrived is, I think, supported by the decision in *Nickoll & Knight v. Ashton, Edridge & Co.* [6 Com. Cas. 150, 152; (1901) 2 K. B. 126, 132; 70 L. J. K. B. 600, 603], and also by the decision in *Baily v. De Crespigny*, [(1869) L. R. 4 Q. B. 180, 186; 38 L. J. Q. B. 98, 102]. The particular passage in *Nickoll & Knight v. Ashton, Edridge & Co.* upon which reliance is placed by Mr. Raeburn on behalf of the sellers is in the judgment of A. L. Smith, M. R., where he quotes from the judgment of Blackburn,

J., in *Taylor v. Caldwell* [(1863) 3 B. & S. 826 at p. 833; 32 L. J. Q. B. 164, 166], laying down a rule as to the construction of certain contracts, which rule is as follows: 'Where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.' It is to be observed that in that rule stress is laid upon the perishing of the thing which was the foundation of the contract before breach. The principle of the case seems to me equally applicable to that now under consideration where by reason of the lawful act of the executive the thing, in a sense, has perished. Certainly through the act of the British Government it is no longer in the power of the sellers to perform their contract. * * *

"It must, however, be clearly understood that we are not by this decision in answer to the questions put to us deciding that if the sale had not been of specific goods that the sellers would have been excused; but it is because the sale was a sale of specific goods and was therefore rendered impossible of performance when the goods were lawfully requisitioned by the British Government that

I come to the conclusion that the sellers are excused."

Mr. Justice Lush dealt with the whole question very neatly at page 143, as follows:

"Whenever it is necessary to consider, as it is in this case, whether a supervening impossibility of performance excuses the contracting party, one must of necessity consider what the nature of the impossibility is, and what has given rise to it. Willes, J., in *Clifford (Lord) v. Watts* [(1870) L. R. 5 C. P. 577, 586; 40 L. J. C. P. 36] stated the principle in this precise way: 'Where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and hath no remedy over, there the law will excuse him.' In this case the impossibility which supervened after the making of the contract was an impossibility created by an act of State. The moment these goods were requisitioned it became the duty of the vendors to comply with the requisition, and an act of State made it contrary to the duty of the vendors to carry out the contract to the buyers. The case therefore clearly falls within the principle that has been so often acted upon that the vendors are excused from performance of their contract where it is impossible for them legally to perform their obligation owing to an act of State and not through any default on their part. The vendors here have committed no breach of their contract, and I think that the question put by the arbitrators should be answered in the way indicated by my Lord."

In *Nickoll v. Ashton* (1901) 2 K. B. D. 126, where the defendant had sold a cargo of cotton seed to be shipped

on the steamship *Orlando* in January, when owing to a stranding of the *Orlando*, without any fault on the seller's part, she was unable to carry the cargo, it was held that the contract was frustrated.

In *Taylor v. Caldwell* (1863), 3 B. & S. 826, the lease of a music-hall was held to be frustrated by the destruction of the hall by fire.

In *Appleby v. Meyers* (1867) L. R. 2 C. P. 65, there was a contract to supply and instal machinery in a building. After partial instalment, the premises and the machinery were destroyed by fire, and Mr. Justice Blackburn held that both parties were excused from further performance.

In *Metropolitan Water Board v. Dick, Kerr & Co.* (1917) 2 K. B. 1; (1918) Appeal Cases 128, there was a contract for the construction of a reservoir in 1914. In 1916 the Ministry of Munitions, under the Defense of the Realm Act, ordered the defendants to stop work and to sell such material as it had on hand to munition factories. This governmental act was held by the House of Lords to have terminated the contract.

In *Marks Realty Co. v. Hotel Hermitage Co.*, 170 App. Div. 485 (N. Y.) the defendant agreed to pay for an advertisement of its business in a "souvenir and program" of a certain national yacht race, when the program should be published. The race was cancelled, owing to the European War.

It was held that since the holding of the race was of the essence of the contract, defendant was excused from performance.

The Court said at page 485:

"This is not where a promisor has failed to guard himself against a *vis major*. It is not a performance on one side, the other having no appropriate clause to excuse default. But it is where the situation, as it turns out, has frustrated the entire design on which is grounded the promise. An advance issue of the programs cannot fairly be held to be what defendant was to pay for. The object in mutual contemplation having failed, plaintiff cannot exact the stipulated payment."

In *Southern Railway Co. v. Wallace* (1911) 175 Ala., 72, 56 So. Rep., 714, it was held that quarantine regulations made subsequent to the contract, preventing the shipment of cattle, excused performance.

In *Gesualdi v. Personeni* (1911), 128 N. Y. Sup. 683, performance of the contract for the sale of patent medicines was excused upon the sale becoming illegal by subsequent government regulations adopted under the Federal Pure Food Law.

In *Hildreth v. Buell* (1854), 18 Barb., 107, failure to perform an agreement to furnish iron for locks in a canal being constructed was excused on account of the subsequent act of the legislature suspending the work.

In *Stewart v. Stone*, 127 N. Y., 500, it was held that the performance of a contract to manufacture cheese and butter, market the same and deposit the proceeds to the credit of the plaintiff who delivered milk for that purpose, was excused by the destruction of the factory by fire.

The doctrine of frustration of commercial contracts is an outgrowth of the fact that time is of the essence in such contracts.

Situations constantly arise in which it is necessary that the parties should immediately know what their respective rights are.

As Mr. Justice McKenna put it in the *Allanwilde* case, 248 U. S. 377, on page 386, in dealing with the question of an indefinite embargo :

“The condition was, therefore, so far permanent as naturally and justifiably to determine business judgment and action depending upon it. *The Kronprinzessin Cecile*, 244 U. S. 12.”

When a charterer has made a voyage charter for the carriage of cargo, and has his commitment to the cargo owner to fulfill and when, as here happened, the vessel which he has chartered is prevented from performing the charter party, whatever may be the cause of that prevention, his first instinct and necessity is to secure another vessel to carry the cargo for which he is committed. That is exactly what was done in the present case when the Texas Company, on April 14th, evidently as soon as possible after the requisition, chartered the steamship *Vimeira* to lift the oil cargo which they expected to ship by the *Baron Ogilvy*. 104.

The fact that time is of the essence in these matters is shown by the universal custom of having every charter party contain the so-called cancelling clause providing that the vessel must arrive at a loading or discharging

port on or before a certain date, failing which the charterer has the option of calling the contract off.

When a situation arises, such as arose in this case, it is of the essence of commercial law that the parties should know just what their rights are at the time when the trouble occurs.

The charterer must know that he is not in danger of having the chartered vessel cast back on his hands with a demand for performance on his part and that he may safely go about to arrange other commitments.

The owner, on his side, ought to know whether in case the Government should suddenly change its mind, he would be free to deal with his vessel as he likes.

Suppose in the present case for example, that suddenly the Government had changed its plan about using the *Baron Ogilvy* and had freed the vessel, say, about the 15th or 20th of April and she had proceeded to Port Arthur and arrived there before May 15th and demanded a cargo of oil from the Texas Company. The situation would then have been that the Texas Company would have had both the *Vimeira* and the *Baron Ogilvy* on its hands with, so far as appears, only one cargo with which to load them. It is not difficult to fancy the attitude which the Texas Company would have taken if such a thing had occurred. They, undoubtedly, would have said that the matter was all off when the *Baron Ogilvy* was requisitioned by the British Admiralty, and that the owner could not come back after the Texas Company had got another vessel for the cargo intended for the *Baron Ogilvy* and demand a second cargo. The owner would have had his trip to Port Arthur in vain.

It is to guard against the possibility of just such situations as this that the doctrine of frustration has arisen and is a necessity in commercial law because parties must know their rights at once in order to feel safe in going ahead and making other arrangements when the subject matter of one of their contracts has failed.

It is submitted, that this is the only conceivable, workable commercial theory to be applied when something happens by operation of *vis major*, without fault of either party, which renders it certain that a vessel which has been engaged under a charter party cannot perform her contract.

The result would not have been any different in the present case if the *Baron Ogilvy* had been sunk, without her owners' fault, so that it was obvious she could not be raised in time to perform her contract, or if without her owners' fault she had been so badly burned that it was obvious she could not have been repaired in time to perform her contract. She was, as Judge Hough suggested, as entirely removed so far as the performance of the Texas Company contract was concerned, as if she had been destroyed. 708-709.

It is well settled that in commercial matters a contract for April shipment or delivery is not satisfied by a shipment or delivery in August or September, and so in charter parties a charter under which a vessel is to be delivered in April or May is quite a different charter from a commercial standpoint than a charter in which the vessel is to be delivered in October or November.

In other words, what is contracted for by a charter such as that of the Baron Ogilvy is the commercial service

of the vessel to the charterer for a voyage commencing at the port of loading at the time named. *Dorrance v. Barber*, 262 Fed. 489 (1919); *Cornell &c. Co. v. Diederichsen & Co.* 213 Fed. 737; *Bowes v. Shand*, 2 App. Cas. 455.

A voyage which would commence in October or November is not the same voyage in a commercial sense, although the port of loading and destination might be the same.

It is perfectly clear, therefore, that the fact that the requisition rendering the commercial voyage intended absolutely impossible of performance, put an end to the charter party and excused both parties from any liability for damages.

This is the principle underlying the decision of the Circuit Court of Appeal for the Second Circuit in the case of *Lewis v. Mowinkel*, 215 Fed. 710 (1914), affirming a decision by Judge Ward, in which a libel was filed by the charterer of the steamship *Moldegaard* to recover damages from her owner for failure to perform a charter party dated September 16, 1911. The charter was for about one year, beginning from the time of her delivery to the charterer, upon the completion of a charter to the Munson Steamship Line, which was then being performed. The flat period of the Munson charter expired January 7, 1912. While under the Munson charter the *Moldegaard* stranded on one of the Bahama Islands, was given up as lost, finally was salvaged, and was again ready for service in February, 1913.

This Court emphasized the fact that the parties when they were entering into a charter could not be interpreted to have intended a charter which began more than a year

after the expiration of the Munson charter on January 7, 1912, and said, at page 711:

“We agree with the District Court in thinking that the stranding of the steamer, in such circumstances as to induce her owners to believe that she would become a total loss and in any event to make her employment impossible for many months, release them from liability under the charter. It excused both parties, but did not make a new contract.”

The same point is emphasized in the opinions of the House of Lords in the case of *Bank Line, Ltd. vs. Arthur Capel & Co.*, (1918) 35 T. L. R. 150.

In that case a steamship, the *Quito*, was chartered from her owners by a charter party dated February 15, 1915, with delivery date not before April 1st or after April 30th. The charterers did not cancel, although the vessel was not ready by the cancelling date, and whilst the vessel was preparing for service under the charter she was requisitioned by the British Admiralty for an indefinite period.

In August, 1915, the owners received an offer from third parties for the purchase of the vessel provided they could get her released from the requisition. They succeeded in getting her released by substituting another vessel belonging to them. The next day the charterers called on the owners to deliver the vessel under the charter. The owners contended that the charter had been frustrated by the requisition and in an action by the charterers against the owners for a declaration that the charter had not been frustrated, the House of Lords held that it had been frustrated and that the requisition ended

all rights between the parties and left the owners free to sell the vessel as they had done.

The Lord Chancellor, Lord Finlay, said, 35 T. L. R. at page 152:

“The charter was to be for 12 months from delivery, which the owners were to make by the end of April unless prevented by unforeseen circumstances, in which case the charterers had the option of cancelling, however short the delay. If, owing to unforeseen circumstances, it became impossible for the owners to deliver under the charterparty until many months after the end of April, the whole character of the adventure would be changed. A charter for 12 months from April was clearly very different from a charter for 12 months from September. In such a case the adventure contemplated by the charter was entirely frustrated, and the owner when required to enter into a charter so different from that for which he had contracted was entitled to say ‘*non haec in foedera veni*’.”

Lord Sumner, who is generally considered by the English bar as the best commercial Judge in England at the present time, said at page 153 (italics ours):

“What then was the nature of the charter? It was not in form an April to April charter but it was sufficiently so in substance. If the ship had been placed at the disposal of the charterers when released by the Admiralty, she would virtually have been in their hands for a September to September hiring. The mere change in the initial month of the actual hiring was not quite the point, for this was not the old comparison of a summer with a winter voyage. In either case she would

have been on hire for each month of the twelve and the exact cycle of the seasons would make little difference to her. What was important was this. During all the months of the *Quito's* service for the Admiralty the charterers would not in the least know when, if ever, they would have her on their hands. They could not tell whether they might suddenly have to find employment for her, or whether they must make provision for the current necessities of their trade without counting upon her at all. In one respect they would be at an indubitable disadvantage. The postponement of the beginning of her hire at any rate brought nearer the end of the war, after which the charterers would have to pay war rates for the ship and only have the use of her in peace employment. In the latter respect the owners' position also would be one of indecision, for their business was one that required that they should look ahead and in doing so they could not tell when, if at all, they were to have the *Quito* once more on offer. These uncertainties in commerce were very serious. *Lord Justice Scrutton asked himself if the September to September employment would be in substance the same employment as that from April to April. He (Lord Sumner) agreed with him that it would not, and he thought that the uncertainties of the intervening period in time of war both emphasized the difference between the two and added to the gravity of the lapse of time taken by itself."*

Later on, in his opinion, Lord Sumner adopted, as the best definition of a frustration which results in the dissolution of a commercial contract, a remark of Lord Dune-

in *Metropolitan Water Board v. Dick, Kerr & Co.*, (1918) A. C., at page 128, which was:

“An interruption may be so long as to destroy the identity of the work or service, when resumed, with the work or service when interrupted.”

At page 156, after discussing other definitions and the nature of frustration, Lord Sumner said (italics ours):

“For his own part he inclined to prefer the expression already quoted from his noble and learned friend Lord Dunedin, and substantially adopted by Lord Justice Scrutton in the Court of Appeal.

“*Applying these considerations, he was of opinion that the requisitioning of the Quito destroyed the identity of the chartered service, and made the charter, as a matter of business, a totally different thing. It hung up the performance for a time, which was wholly indefinite and probably long. The return of the ship depended on considerations beyond the ken or control of either party. Both thought its result was to terminate their contractual relation, and as they must have known much more about it than his Lordship, there was no reason why he should not think so too. He would allow the appeal.*”

Lord Wrenbury in his opinion, 35 T. L. R., at page 156, dealt with the question of the change of the time of service on the same principle.

In the case of *Metropolitan Water Board v. Dick, Kerr & Co.* (1918), A. C. 119, the same point was stressed by

Lord Dunedin, at page 128, who referred with approval to the old case of *Jackson v. Marine Insurance Co.* (1874), L. R. 10 C. P. 125, in which the same point was involved.

The principle of frustration is pointedly illustrated by the decision of Mr. Justice Atkin, now Lord Justice of Appeal, in the case of *Lloyd Royal Belge Soc. Anon. v. Stathatos*, 33 T. L. R. 390; affirmed 34 T. L. R. 70, which was the case of a voyage charter party on a time basis made December 1, 1916, whilst the vessel was at Gibraltar.

On December 2nd the vessel was detained by British authorities, because of her nationality and held until February 10, 1917. On December 12, 1916, the charterer gave notice that he considered the charter at an end.

The action was brought by charterers under the English practice for a declaration that the charter party was terminated, and for recovery of hire paid in advance.

Mr. Justice Atkin, in the Court below, said in the course of his opinion:

“The substantial point that the plaintiffs raised was that the common adventure contemplated by both parties was frustrated by the detention and that the contract was thereby dissolved.
* * * As to the doctrine of the frustration of the adventure, I have the advantage of a definition by my brother Bailhache approved by the Court of Appeal in *Admiral Shipping Company v. Weidner, Hopkins and Co.* (33 *The Times* L. R. 71; (1917) 1 K. B., at p. 242), where he said: ‘The commercial frustration of an adventure by delay means, as I understand it, the happening of some unforeseen delay without the fault of either party

to a contract of such a character as that by it the fulfilment of the contract in the only way in which fulfilment is contemplated and practicable is so inordinately postponed that its fulfilment when the delay is over will not accomplish the only object or objects which both parties to the contract must have known that each of them had in view at the time they made the contract, and for the accomplishment of which object or objects the contract was made.' "

* * * *

"But in this case it appears to me that the only adventure contemplated was one voyage outwards to New York and thence to Havre—a voyage which both parties knew the charterers desired to commence and end as quickly as possible. It is true that the parties adopted a form which is applicable to time charters and was called a time charter. In substance, the adventure was a charter for a voyage with freight payable at a time rate. In such circumstances the detention in question by the British Government for reasons of State, which would not be fully known to the parties, and for a period the duration of which must be uncertain and might be prolonged, appears to me to be just such a delay as falls within the doctrine as defined in the words I have quoted. I think, therefore, that the contract was dissolved by the happening of the detention, and I think that it was dissolved as from the date when the detention began, viz., on December 2. Should the right view be that the contract is not dissolved until one of the parties elects to declare it dissolved, then the contract would be dissolved on December 12."

He also held that no recovery could be had of the hire paid in advance.

In the Court of Appeal the judgment was affirmed.

Lord Justice Pickford said at page 72:

"It was said that the charter was at an end because of what he would call for convenience the frustration of the adventure according to the doctrine laid down by Lord Haldane in the *Tamplin* case (32 *The Times L. R.*, 677; (1916) 2 A. C., 397). It was not necessary to repeat the words used by Lord Haldane in that case. It was established that so far as this Court was concerned the doctrine which he would call the doctrine of commercial frustration of the adventure did apply to a time charter as well as to a voyage charter, and the question arose whether on the facts of this case the doctrine was applicable. He thought that the case was very near the line. But Mr. Justice Atkin had held that on the facts there was such an interruption of the common object of the parties as amounted to a frustration of the commercial adventure and that therefore the contract was dissolved. He (his Lordship) saw no reason to differ from the learned Judge's decision."

The hire paid in advance was not recoverable because:

"They could only recover the money by virtue of some provision in the contract, and as the contract had come to an end there was no provision under which the money could be recovered. The charterers were not entitled to recover back the hire paid in advance. The appeal must be dismissed."

It is submitted that the *Lloyd Royal Belge* case goes further than the court is asked to go in this case, because the detention there might well have been of a more or less temporary nature whilst here the requisition would obviously wholly prevent the contemplated voyage being made at the contemplated time.

To the same effect as the decisions above quoted are the decisions of the English Court of Appeal in the cases of the *Scottish Navigation Co., Ltd. v. W. A. Souter & Co.*; the *Admiral Shipping Co. v. Weidner Hopkins & Co.* (1917), 1 K. B. 222, which were heard together in the English Court of Appeal.

(7) *The cases cited by the Appellant, in which it is held that foreign governmental interference is not an excuse for non-performance of the contract, are distinguishable from this case on the ground that the governmental interference therein mentioned did not involve destruction of the subject matter of the contract.*

Furness Withy & Co. v. Rederiaktiebolaget Banco, 23 Com. Cas. 99, 103, was not a case of frustration. The Court, in that case, merely held that under the terms of the charter which included a "restraint of princes" clause the charterer was entitled to use a Swedish vessel only between such ports as the Swedish Government permitted.

There is a dictum to the effect that if there had been no "restraint of princes" clause the mere fact that the contract was illegal under the law of a foreign state to which one of the contracting parties belonged, would not

make the contract illegal or unenforceable if it were an English contract to be construed and enforced according to English law.

The appellee herein need not deny this dictum. His contention is simply that where the subject matter of the contract has been, in effect, *swept out of existence* by some *vis major* it is immaterial that this result is caused by the action of a *foreign* government. It will be noted that in this *Banco* case the vessel was not taken from the parties. The vessel could still be used, between Swedish ports. This narrowed the range of her use, but did not prevent it.

A similar situation often arose in respect to British time chartered ships during the war, when German and Austrian ports were illegal for them yet the charter continued operative for use to non-enemy ports. The charter was merely narrowed not destroyed.

Rederiaktiebolaget Amie v. Universal Transportation Company, Inc., 250 Fed. 400 (1918), involved a contract to purchase a Swedish ship, payments being made in the form of charter hire, the owner to deposit a bill of sale of the vessel with an American Trust company. The deposit of the bill of sale was not made, the owners claiming that Swedish law prevented.

The Court below held this was no excuse and in the Circuit Court of Appeals for the Second Circuit Judge Ward, speaking for the court, said:

“No action of the Swedish Government would excuse the defendant from its covenant to do so (deposit a bill of sale), there being no exception in the agreement like that common in charter parties

and bills of lading, of arrests and restraints of princes. *Nor did the evidence adduced show any such restraint by the Swedish Government.* Therefore the Court properly held as a matter of law that the defendant having had from December 10, 1915 to April 5, 1916 to deposit the bill of sale with the United States Mortgage and Trust Company, had breached its contract in not doing so."

As the evidence failed to show restraint by the Swedish Government, the Court's statement as to the possible result if the Swedish Government had prevented the deposit of the bill of sale, is, it is submitted, pure dictum.

This contract of sale had been entirely executed on one side. The vessel had not been requisitioned by any government or otherwise removed from the control of the parties. Therefore this case cannot be considered as an authority in the instant case, because the subject matter of the contract—the use of the vessel—was not removed from the control of the parties in such a way that the purpose of the contract could not in part at least be accomplished.

If Sweden had seized the *Ada* the situation would be different.

Jacobs v. Credit Lyonnais (1884), L. R. 12 Q. B. D 589, was a contract made by two Englishmen for the sale of 20,000 tons of esparto to be shipped from Algeria to England. Nine thousand tons were in fact shipped and shipment of the balance was prevented by insurrection in Algeria, the workers being intimidated and the military authorities by their commands preventing collection of esparto.

It should be noted that this was not a separable contract, but one for the delivery of 20,000 tons, of which almost one-half had been delivered. There was therefore no sweeping away of the *whole* subject matter of the contract. The purpose having been almost fifty per cent. accomplished, the Court could not look at the unperformed part as a separate contract for the delivery of 11,000 tons, but was compelled to consider the whole contract.

The case is, therefore, not on all-fours with the present case, where the whole subject matter was entirely removed from the control of the parties and no part of the purpose of the contract had been or could be accomplished.

The cases of *Liverpool v. Phenix Insurance Co.*, 129 U. S. 397, and *China Mutual Insurance Co. v. Force*, 142 N. Y. 90, are to the effect that unless the parties have some other law in mind at the time of making a contract its construction, nature and obligation are to be determined by the law of the place where it is made. Where one party, therefore, has an excuse for non-performance under some foreign law, if the excuse is not valid under the *lex loci contractus* he will not be excused.

The appellant has cited various other cases which are not authorities against the proposition that the charter party was frustrated in this case.

We have ventured to add as Appendix B to this brief a differentiation of the principal cases cited by the appellant from the situation that existed in the instant case.

The respondent herein claims a good defense *under American law*, hence these cases are beside the point.

Tweedie Trading Co. v. James P. McDonald Co., 114 Fed. 985 (1902) was similar to the English case of *Jacobs v. Credit Lyonnais*, L. R. 12 Q. B. D. 589, in that the contract had been partly performed and therefore the whole subject matter of the contract was not swept away in the same manner as in the instant case.

It was not a charter party case, but a breach of contract to supply laborers, full performance of which was prevented by the law of Barbados.

The distinction which the appellee calls to the attention of the Court is exactly the one which was taken by Judge Hough below. He said, 707-709:

"The fact that the interfering action was governmental and foreign, has been the groundwork or moving cause of libelant's action. That is, reliance is placed on decisions holding that foreign governmental *vis major* preventing performance does not excuse. No decision binding on this court goes so far as to state the rule as above argued for. Whether the English cases touching on the matter can be reconciled, I more than doubt, but am not much concerned with: but neither *Liverpool &c. Co. v. Phenix*, 129 U. S. 397, nor *The Ada*, 250 F. R. 400, decided more than that one who in this country made a lawful contract, not in accord with the law of his own country, could not plead the foreign law to prevent his paying damages.

"That is a very different thing from destroying (in a very real sense) the subject matter of agreement. If it be true as I believe it to be, that for the purpose of this suit the *Ogilvy* was or became non-existent, then the governmental element becomes as unimportant as the foreign, also the

absence of the 'restraint' clause, and the question is really reduced to its lowest terms, viz: whether the facts present a case of that 'impossibility of performance' which is and long has been a recognized and growing reason for dissolving a contract."

The *Baron Ogilvy* charter was, therefore, terminated by what was in effect a destruction of the subject matter and all contract relations between the libelant and respondent which had arisen by reason of their having entered into the charter were entirely ended because:

1. The ship was entirely taken away from the charterer's service by Governmental *vis major* without fault on the part of the shipowner.

2. At the time the requisition was made the libelant did not expect and a reasonable business man would not have expected that the steamship would be returned in time to perform the chartered voyage in view of the government's need for mule-carrying ships for its military operations.

3. The vessel was in fact not released from the requisition until a period much greater than would have been required for performance of the charter.

II. IF THE COURT SHOULD FIND THAT THERE WAS NOT A FRUSTRATION OF THE CONTRACT OF CHARTER PARTY, WHEREBY THE RIGHTS AND OBLIGATIONS OF THE PARTIES THERETO WERE TERMINATED, RESPONDENT HOGARTH SHIPPING COMPANY, LIMITED, IS NOT LIABLE FOR FAILURE TO TENDER THE

STEAMSHIP *Baron Ogilvy* UNDER THE EXPRESS PROVISIONS
OF THE SPECIAL CLAUSE OF THE CHARTER PARTY.

They were a part of the contract when it was signed. This is shown by the charter party itself, *Libelant's Exhibit 2*, 470-473, concerning which Mr. Mouris, who acted as agent for the respondent Hogarth Shipping Company, Limited, testified. *Mouris*, 109-110.

The special clause which was attached to the charter party at the time of signing is, in part, as follows:

"It is a condition of this charter and the charterers undertake that:—

(1) The ship shall be employed only in such trades and employments and shall carry only such goods, persons and things as are lawful for a British ship.

* * * * *

(3) There shall not be any breach of any of the warranties which are now or may during the continuance of this charter be contained in the policies or contracts of insurance of the ship with the War Risks Insurance Association in which the ship is entered. The warranties now contained in such policies are as follows:

(a) *That the ship shall comply, so far as possible with the orders of His Majesty's Government and the directors of the Committee as to routes, ports of call and stoppages.*

(b) *That the ship shall not start on the voyage if ordered by His Majesty's Government not to do so.*

* * * * *

Upon breach of any of the conditions and undertakings mentioned in this clause, the owners shall have the right at any time to withdraw the ship from the service of the charterers, but notwithstanding such withdrawal the charterers shall in addition to any liability for damages, continue liable for the hire or freight hereby agreed to be paid.

The above clauses to be incorporated in all bills of lading." 469-473.

These clauses amount in effect to a restraint of princes clause or at least to a provision that the vessel would be excused from not performing any voyage which the British Government forbade. They undoubtedly did forbid the charter voyage in the present instance.

The effect of the incorporation of such clauses in a charter party in excusing non-performance by the owner is evidenced by the case of *The Athanasios*, 228 Fed. 558, where the charter did not contain any *restraint of princes* exemption, but in which it was provided that bills of lading given under it should contain such a restraint. Judge Hough excused an owner from performance of a voyage charter on that ground.

Consequently, it is submitted the special voyage charter clause operates as an exception excusing non-performance of the contract by the owners.

III. THERE IS NO LIABILITY ON THE PART OF RESPONDENTS HUGH HOGARTH AND SONS FOR FAILURE TO TENDER THE STEAMSHIP *Baron Ogilvy* OR SOME OTHER STEAMSHIP FOR PERFORMANCE OF THE CHARTER PARTY.

Respondent Hugh Hogarth and Sons did not own the Steamship *Baron Ogilvy* or any other vessel. *Hogarth*,

136, 139, 167-169. *Thompson*, 399, 400, 434. They were managers of the Hogarth Shipping Company, Ltd. 135. They acted throughout as agents, *Hogarth*, 136, 169-170, *Thompson*, 400, for an undisclosed principal whom the libelant has elected to sue.

Their agency is not disputed and appellant apparently admits that they are not subject to liability in this suit, a fact which, it is claimed, was not clear when the libel was originally filed, 88-89.

IV. IF THE APPELLANT HAS ANY CLAIM AGAINST ANYONE ITS CLAIM LIES AGAINST THE BRITISH GOVERNMENT FOR HAVING TAKEN FROM IT THE USE OF THE STEAMSHIP *Baron Ogilvy*.

If the libelant has suffered any damage by reason of the act of the British Government its remedy lies by proceedings in the British Courts by petition of right against the British Government.

This is the intimation of the libelant's proper remedy in the event of a frustration of a time charter party by requisition contained in *Chinese Mining & Engineering Co., Ltd. vs. Sales & Co.* (1917), 2 K. B. 509, at the top of page 602.

It is settled that such a petition is maintainable by an American citizen or corporation because of the reciprocal rights given in our Courts for suits against the Government by English citizens.

United States vs. O'Keefe, 11 Wall. 178;

Statutes of 23rd and 24th Vict. July 3, 1860.

An instance where a British steamship owner was allowed to sue the United States Government in the Court of Claims is the case of *Maclay vs. U. S.*, 43 Court of Claims 90, and an instance of suit under the Tucker Act in our District Court is the case of the *New York & Oriental S. S. Co., Ltd. vs. U. S.*, 202 Fed. 311; 216 Fed. 61, which was tried before Judge Learned Hand and affirmed by the Court of Appeals.

In that case a stipulation was entered into by the District Attorney here that the statutes above mentioned and *U. S. vs. O'Keefe*, 11 Wall. 178 should be received as evidence of the fact that the Government of Great Britain accords to citizens of the United States the right to prosecute claims arising from express or implied contracts against the Government of Great Britain in the Courts of that country.

Thus the appellant is not remediless if it can make out a proper case. It has merely mistaken its remedy and its claim, if it has any, is against the British Government direct, not against the ship-owner who has been guiltless of any breach of contract and whose charter party to the appellant was frustrated by the action of the British Government.

LAST POINT.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.
October, 1920.

Respectfully submitted,

JOHN M. WOOLSEY,
HARRISON LILLIBRIDGE,
Of Counsel.

APPENDIX A.

Leading Cases on Frustration.

Cases relating to pure voyage charters or voyage charters on a time basis:

Lloyd Royal Belge Soc. Anon., 33 T. L. R., 390;
34 T. L. R. 70.

Allanwilde Transport Corporation v. Vacuum Oil Co. (1919), 248 U. S., 377.

Admiral Shipping Co. v. Weidner, Hopkins & Co., 33 T. L. R. 71; (1916) 1 K. B. 429; (1917) 1 K. B. 222.

Civil Service Society, Ltd. v. General Steam Navigation Co. (1903) 2 K. B. D. 756.

Scottish Navigation Co. v. Souter & Co. (1916) 1 K. B. 675; (1917) 1 K. B. 222.

Geipel v. Smith (1872) L. R. 7 Q. B., 404; 1 Asp. Mar. Cas. 268.

Jackson v. Union Marine Ins. Co. (1874) L. R. 10 C. P. 125.

Cases Relating to Pure Time Charters:

Bank Line, Ltd. v. Arthur Capel & Co., Ltd., 35 T. L. R. 150. (1918, House of Lords.)

Anglo-Northern Trading Co. v. Emlyn, Jones & Williams (1917) 2 K. B. 78; (1918) 1 K. B. 372.

The Countess of Warwick Steamship Co. v. Le Nickel Soc. Anonyme (1918) 1 K. B. 372; 34 T. L. R. 27.

Heidger's v. Cambrian Steam Navigation Co., 33 T. L. R. 348; 34 T. L. R. 72.

F. A. Tamplin S. S. Co. v. Anglo-Mexican Petroleum Co., Ltd. (1916) 1 K. B. 485; (1916) 2 A. C. 397.

Chinese Mining and Engineering Co. v. Sale & Co. (1917) 2 K. B. 599.

Lewis v. Mowinckel, 215 Fed. 710.

Isle of Mull, 257 Fed. 798.

Capel v. Soulidi (1916) 1 K. B. 439; (1916) 2 K. B. 365.

Furness, Withy & Co. v. Rederiaktiebolaget Banco (1917) 2 K. B. 873.

Earn Line Steamship Co. v. Sutherland Steamship Co. 254 Fed. 127 (1918); affirmed in C. C. A. February 18, 1920.

Gans S. S. Line v. The British Steamship Frankmere, 262 Fed. 819 (1920).

Cases relating to contracts other than charter parties:

Shipton-Anderson & Co. v. Harrison Brothers Co. (1915) 21 Com. Cas. 138.

Metropolitan Water Board v. Dick Kerr & Co. (1917) 2 K. B. 1; (1918) A. C. 119.

Appleby v. Meyers (1867) L. R. 2 C. P. 65.

Taylor v. Caldwell (1863) 3 B & S 826.

Nickoll v. Ashton (1901) 2 K. B. D. 126.

Howell v. Coupland (1876) 1 Q. B. D. 258.

Krell v. Henry (1903) 2 K. B. D. 740.

Stewart v. Stone, 127 N. Y. 500.

Marks Realty Co. v. Hotel Hermitage Co., 170 App. Div. 485 (N. Y. 1915).

Southern Railway Co. v. Wallace (1911) 175 Ala. 72; 56 So. Rep. 714.

Gesualdi v. Personeni (1911) 128 N. Y. Sup. 683.

Hildreth v. Buell (1854) 18 Barb. 107.

Jones v. Judd (1850) 4 N. Y. 412.

APPENDIX B.

Cases cited by appellant's counsel analyzed and distinguished.

1. The following cases mentioned at page 31 of petitioner's brief relate to whether the fact that foreign law prevents performance of the contract at the place where it is to be performed is an excuse under the *lex loci contractus*. As the appellees claim a frustration under *American law*, these cases are beside the point.

Lloyd v. Guibert, 6 Best & S. 100.

Liverpool v. Great Western Company, 129 U. S. 397.

China Mutual Insurance Company v. Force, 142 N. Y. 90.

2. *Howland v. Greenway*, 22 Howard 491, was a case of seizure of goods by the authorities in Rio de Janeiro, because the manifest was improperly made out. In an action on the bill of lading, recovery was allowed because the master of the vessel was negligent in not acquainting himself with the laws of the country with which he was trading, and duly conforming thereto.

3. *The Harriman*, 9 Wall. 161 (1868), involved a failure to deliver under an entire contract and it was held that since there was no delivery, no freight was due. There was no destruction of the subject matter of the contract in this case.

4. *The Progreso*, 50 Fed. 835 (1892), was not the taking of a ship, but merely a prevention of its use under the charter party, for a definite period of one month, known in advance. This is quite different from a requisition for an indefinite period.

5. *McDermott (Ingle) v. Jones*, 2 Wall. 1 (1864), held that a builder of a house, under contract, on land in which there was a latent defect which required subsequent repairs, was not excused by the latent defect from paying for the subsequent repairs. This is a quite different case from the instant case. If the land had *disappeared* in some manner it might have been analogous. It only involved greater difficulty and expense in performing the contract than was contemplated.

6. In *Blackburn Bobbin Company v. T. W. Allen, Ltd.*, 23 Com. Cas. 471, in the Court of Appeal in England, there was a contract to deliver timber from Finland on railroad tracks at Hull. Owing to the war the timber had to be sent via Scandinavia, instead of direct. It was held that the contract was not frustrated on the specific ground that the means of transportation of the timber was not of the essence of the contract and appeared to be unknown to the plaintiff. The Court very carefully distinguished the question involved from the question of frustration of charter parties, and said at page 472:

* * * "There is really nothing to show that the continuance of that normal method (of transportation) was at the basis of the contract in the minds and intention of the contracting parties. The contract was merely one for the delivery of a

certain quantity of Finnish timber, free on rail at Hull. The plaintiffs did not know how the timber was normally conveyed from Finland to Hull and I see no reason for holding that the normal mode of conveyance must be deemed to have been in their mind and intention."

7. In *Hudson v. Hill*, 2 Asp. Mar. Cas. 278 (1874), a vessel was chartered to carry sugar from Barbados to London. The charter was made December 28, 1870, the vessel to "proceed forthwith" to loading port, laydays not to commence before April 1st. There was not any cancelling date in the charter. Owing to excepted perils, the vessel did not arrive until July 28th, which was the very end of the sugar season. The charterer refused to load and the vessel left for other business. The owner sued for breach of contract and the jury found that the date of arrival did not put an end, in a commercial sense, to the adventure. A verdict for the plaintiff was directed and the Court of Common Pleas discharged a rule to set aside the verdict, as against the evidence, saying that it was not impossible to load, although it was perhaps impossible to load at a profit.

The principle of frustration was therefore clearly recognized, but on the particular facts of the case it was found that the contract was not frustrated. We are not given the circumstances in detail, upon which the jury arrived at their conclusion and, therefore, it is submitted that the case cannot properly be considered as against the contention of the respondents in the instant case that the charter party of the *Baron Ogilvy* was frustrated.

Furthermore, *Hudson v. Hill* did not involve any

taking of the vessel or removal of it from the control of the parties, but simply a delay in reporting at loading port, which is quite a different matter.

8. *The Star of Hope*, Fed. Cas., No. 13,312 (1866), was a case of a voyage charter party to carry cargo from a port in Maine to Fort Gaines, Alabama. There was a delay in reporting at loading port, caused by excepted perils. The charterer repudiated the contract, but it was held that the charter party was not frustrated by the delay. No taking of the vessel was involved and the cargo in question was actually carried by the vessel, the parties agreeing to litigate the question of whether freight was payable at the rate of the original charter or the rate of a subsequent charter. The Court held that the original charter rate should be allowed, because the charter party had not been frustrated.

9. *Barker v. Hodgson* (1814), 3 Maule & S. 269, did not involve any taking of the vessel, but merely a prohibition of intercourse between the vessel and the shore at the loading port, because of pestilential disease.

10. *Ashmore v. Cox*, L. R. (1899) 1 Q. B. D. 436, involved a contract to sell hemp to be shipped from a port in the Philippines, by sailing vessel, between May 1st and July 31, 1898. There was a provision that if the goods did not arrive, from the loss of the vessel or other unavoidable cause, the contract was to be void. It was stated that owing to the Spanish-American War the shipment could not be made, but it does not appear in just what way shipment was prevented. A shipment was

subsequently made by steamer on September 15th, and the shipment was declared under the contract, by the sellers, on October 27th. The buyers refused to accept the declaration.

It was held that the declaration was defective; that a proper declaration was a condition precedent; that there was no implied condition of impossibility of performance and that the express exception only applied to goods shipped between May 1st and July 31st, and hence was inapplicable to the goods declared. The Court therefore gave the intended purchasers judgment against the sellers, for breach of contract.

The nature of the impossibility of performance in this case is not stated, but the case is clearly distinguishable from the instant case, because *no specific goods were involved*, and, as the Court intimates at page 442, if the sellers had declared hemp shipped between May 1st and July 31st, the sellers might have escaped liability.

Lord Russell said at page 442:

“The ship was not, as it were, ear-marked. The seller might appropriate to the contract any shipment of proper quality, by sailer or sailers within the stipulated dates.”

This being so, it cannot be said that the subject matter of the contract was destroyed. The trouble was that the only declaration of goods which was made was void.

11. *Carnegie Steel Company v. United States*, 240 U. S. 156 (1916), was a government contract for eighteen-inch steel plates, in manufacturing which the Steel Company met with unforeseen and very serious difficulties,

fact that the Peruvian authorities only permitted this particular vessel to load the amount which was actually loaded. It was held that inasmuch as it was the charterer's duty to procure the permit and there was no allegation that the vessel was in an improper condition to load the full cargo, the owners were entitled to recover.

This was not a separable contract and was partially performed and rests on the ground of a breach of duty on the part of charterers.

15. *Beebe v. Johnson*, 19 Wend. 500 (1838), was a contract to perfect in England a patent, so as to insure the plaintiff the exclusive use in Canada. It later developed that the right was not given by England, but by the Canadian Government and only granted to the subjects of Great Britain or residents of the provinces, and hence could not be granted to the plaintiff.

It was held that this was not an excuse for non-performance and that the plaintiff was entitled to damages.

This is a case of a contract to do something which was impossible at the start and not a case of a contract which was perfectly possible when made, but was rendered impossible by a supervening act, which swept away the subject matter of the contract.

16. *Holyoke v. Depew*, Fed. Cas. 6652 (1868) was a voyage charter of a vessel to carry goods from the Canary Islands to New York. Upon arrival the authorities would not permit part of the cargo to be loaded, as the vessel came from an infected port.

It was held that inasmuch as the vessel was in fault in not being in proper condition to receive the cargo, in an action by the owner to recover freight on the goods actually carried, the charterer might set off damages caused by the vessel's failure to load the other cargo up to the amount of the freight on the cargo actually carried.

This is not a taking of the subject matter of the contract in any manner, but a default of the vessel.

17. In *Jones v. Holm*, L. R. (1867) 2 Exch. 335, a vessel when partly loaded with cargo caught fire and was scuttled. The cargo which was on board and was damaged was sold at auction. The cargo which had not yet been loaded, was forwarded by another ship. The vessel was raised, repaired and tendered by the owners for the remainder of the cargo, two months after the date of the fire. The charterers repudiated the charter party.

The Court held that there was no frustration.

In reaching this result Baron Bramwell said:

“The first objection made by the defendant was that in the circumstances under which the delay caused by this accident occurred, the voyage became a different voyage; that the ‘original voyage’ was frustrated and the case is therefore within the rule which in the case of such frustration excuses the charterer from loading. *I do not, however, think that the facts stated have this effect. Nothing was said to show that the two months lost made the voyage a different voyage from that agreed for * * *.*”

This is another case where on the facts the charter party was held not to be frustrated by the delay in that particular case. It is submitted that this case is, however, quite different from the instant case. The delay was not of indefinite extent, but could be calculated in advance and was within the full knowledge of the parties.

18. *Hasler v. West India Steamship Company*, 214 Fed. 862 (1914), turns on the question of equitable estoppel and right of cancellation, and has no relation to frustration.

19. *Hurst v. Usborn* (1856), 18 C. B. 141, is another case of delay in arriving at loading port, which involved no destruction of the subject matter of the contract. The ship reported within the terms of the charter and found the charterer in breach of his obligation because he was without ready cargo. This is quite different from the instant case.

20. *The Assicurazioni Generali & Schencker & Co. v. Steamship Bessie Morris Co., Ltd.* (1892), 7 Asp. Mar. Cas., 217, was the case of a vessel chartered to carry from Adriatic ports to London. She loaded and sailed, but became disabled by stranding in the course of her voyage. The vessel was seriously injured and the shipowner refused to continue his voyage, but in an action by the charterer it was held that since the vessel was commercially capable of being repaired and proceeding with the voyage within a reasonable time, the shipowner was liable for non-performance and did not have a right to abandon the voyage.

The vessel was at all times within the control of the parties and whether she could be repaired and returned to service within a reasonable time could be ascertained by them. On this ground the case is clearly distinguishable from the instant case.

21. The following cases turn upon the consideration of the particular contract in question :

United States v. Gleason, 175 U. S. 588.

Chicago, Milwaukee, etc. Railway v. Moore, 240 U. S. 165.

22. *Atkinson v. Ritchie* (1809), 10 East 530, involved a voyage charter to carry goods from St. Petersburg to England. When only partly loaded the Master sailed in consequence of a rumor that an embargo was about to be placed on all English ships. The Master was held liable to the charterer for not loading a full cargo.

There was no actual seizure of the vessel in this case and the Master acted improperly. It is therefore different from the instant case.

23. In *Ye-Seng Company v. Corbitt*, 9 Fed. 423, a vessel was chartered to carry passengers from Hong-kong to Portland. Upon arrival the port authorities, owing to her condition, would not permit her to load passengers. The charterer sued the owner on the contract and recovery was allowed on the ground that the contract had been breached because the vessel was not safe to carry passengers.

This case merely holds that an owner cannot tender an unfit vessel which the port authorities will not permit

to perform their contract and then, having created the difficulty through his own fault, claim that the contract has been frustrated by the port authorities.

24. *Columbus Railway Power & Light Co. v. City of Columbus*, 249 U. S. 399 (1919). The city, by an ordinance which was accepted by the Street Railway Company, had a contract binding the railway to furnish street railway service for twenty-five years, at a specified rate, in return for the use of the streets. During the period the contract became unprofitable to the Street Railway Company, owing to the increase of wages allowed employees by the War Labor Board. It was held that the Railway Company must still perform its contract.

Mr. Justice Day, who delivered the opinion of the Court, says, at page 410:

“There is no showing that the contracts have become impossible of performance. Nor is there any allegation establishing the fact that taking the whole term together the contracts will be necessarily unprofitable. * * * There is no showing in the bill that the War or the award of the War Labor Board necessarily prevented the performance of the contract. Indeed, as we have said, there is no showing, as in the nature of things there cannot be, that the performance of the contract, taking all the years of the term together, will prove unremunerative. We are unable to find here the intervention of that superior force which ends the obligation of a valid contract by preventing its performance.”

On these grounds the case is clearly distinguishable. This case was decided April 14, 1919. At page 413

the Court discusses the case of *Metropolitan Water Board v. Dick Kerr & Company, Ltd.*, (1918) A. C. 119, distinguishes it from the case which was then before the Court, on the ground that the interruption in the *Metropolitan* case was of such character and duration as to make the contract when resumed a different contract from the contract when broken off, and also on the ground that the *Metropolitan* case involved a direct intervention of the power of the government.

25. *The Sun Printing and Publishing Association v. Moore*, 183 U. S. 642 (1901), was an action by the owners against the charterers of a yacht used for dispatch purposes during the Spanish-American War. The vessel was lost in the course of the employment and the Court held that under the various contracts existing between the parties the charterer had agreed to pay the value stated in one of the contracts, in case the vessel should be lost.

This was not a case where a charterer was suing because an owner did not tender a vessel under a charter, and the principle of frustration was not involved therein.

26. *Berg v. Erickson*, 234 Fed. 817 (1916), was a contract to furnish to one thousand cattle "plenty of good grass, salt and water," during the grazing season of 1913, at a certain rate per head. By a drought which amounted to "an act of God," full performance became impossible from July to October, but the performance contracted for was good during May and June and sufficient grass was given during the remainder of the season to keep the cattle alive and maintain their weight.

The Court held that damages were due for the failure to perform fully from July to October.

In the course of his opinion Mr. Justice Sanborn mentions that there were authorities to the effect that where performance of a contract becomes impossible through the destruction of the subject matter, without fault of either party, the contract is frustrated. But he indicates that inasmuch as no decision of the Supreme Court nor of any Federal court to that effect had been cited or discovered, he felt bound to adopt a contrary rule.

It is submitted that the case of *The Allanwilde* and other cases in the Circuit Courts of Appeal and District Courts, cited by the appellees, sufficiently show that this is not the case at present.

Berg v. Erickson is distinguishable, however, on the ground that the contract was performed in full for a part of the time and partially for the balance of the time.

27. *Hadley v. Clarke*, 8 Term. Rep. 259 (1799) shows the common law strictness. In that case the vessel was chartered to carry from Liverpool to Leghorn. While she was awaiting convoy at Falmouth, the Privy Council laid an embargo on all vessels proceeding to Leghorn July 27, 1796. The embargo was not raised until October 24, 1798. In August, 1798, the vessel returned to Liverpool and discharged her cargo, which the shipper received without prejudice and upon the lifting of the embargo sued the shipowner for breach of contract to carry.

The Court reluctantly allowed a recovery, on the ground that "a temporary interruption of a voyage by an embargo does not put an end to such a contract as this."

It is submitted that this case and *Spence v. Chodwick*, 10 Q. B. 517, also cited by the petitioner, *do not represent the present state of the English law as to frustration of charter parties.*

The Court is referred in this connection to the cases of *Lloyd Royal Belge v. Stathatos*, 33 T. L. R. 390, 34 T. L. R. 70, cited in the respondents' brief, and also to Scrutton on *Charter Parties and Bills of Lading*, eleventh Edition, pages 95 to 103, and the brochure of Mr. F. D. Mackinnon on "*The Effect of War on Contracts.*"

United States Supreme Court

October Term, 1980
No. 531

THE TEXAS COMPANY,

Petitioner
(Libelous Appellate Entry)

Respondent

HOGARTH SHIPPING CORPORATION, LTD., owner of
The British Steamship BARON OGILVY, et al.,

Respondents
(Respondents Appellate Entry)

MOTION BY RESPONDENTS TO ADVANCE.

JOHN M. WOOLLEY,

Counsel for Respondents

UNITED STATES SUPREME COURT.

THE TEXAS COMPANY,
Petitioner,
(Libelant-Appellant Below),

AGAINST

HOGARTH SHIPPING CORPORATION,
LTD., owner of the British
Steamship *Baron Ogilvy, et al.*,
Respondents,
(Respondents-Appellees Below).

October Term, 1920.
No. 555.

Sirs:

PLEASE TAKE NOTICE that on Monday, November 22nd, 1920, at the opening of Court on that day, or so soon thereafter as counsel can be heard, we shall make a motion on the annexed affidavit, before the Supreme Court of the United States, at the Capitoll, Washington, D. C., that the above entitled case be advanced for hearing so that it can be argued at the same time as the case of Giuseppe Cavallaro, Petitioner, *vs.* Steamship *Carlo Poma*, her engines, etc.; Kingdom of Italy, Claimant, which is No. 167 on the Docket of the October, 1920, Term of the Supreme Court of the United States, and we shall

then and there also ask the Court to grant the petitioner such other or further relief in the premises as may be just.

Dated, November 16, 1920.

Yours, etc.,

JOHN M. WOOLSEY,
Counsel for Respondents.

To

MESSRS. HAIGHT, SANDFORD, SMITH AND GRIFFIN,
Proctors for Petitioner,
27 William Street,
New York City.

UNITED STATES SUPREME COURT.

THE TEXAS COMPANY,
 Petitioner,
 (Libelant-Appellant Below),

AGAINST

HOGARTH SHIPPING CORPORATION,
 LTD., owner of the British
 Steamship *Baron Ogilvy, et al.*,
 Respondents,
 (Respondents-Appellees Below).

October Term, 1920,
 No. 555.

STATE OF NEW YORK, }
 County of New York, } ss.:

JOHN M. WOOLSEY, being duly sworn, says:

1. I am a member of the firm of Kirlin, Woolsey, Campbell, Hickox & Keating, proctors appearing for respondents.

I am a member of the bar of the State of New York and of the bar of this Honorable Court.

2. This case is now in this Court on a *writ of certiorari* to the United States States Circuit Court of Appeals for the Second Circuit, which was granted on October 25, 1920, when the case was given the number of 555 on the Docket of this Court, October Term, 1920.

In ordinary course, I understand that a case with that number would not be reached for argument during the present Court year.

3. On November 15, 1920, application was made by counsel for the British Embassy in the above case for leave as *amicus curiae* to file a brief and take part in the oral argument in this Court.

I am informed that this Court granted leave to counsel for the British Embassy to intervene as *amicus curiae* and file a brief on behalf of the British Embassy, but reserved decision on the application for leave to take part in the oral argument.

4. The questions involved in the practice of submitting Ambassadorial certificates are of two kinds:

A. Where the Ambassadorial certificate claims immunity of a vessel from the Jurisdiction of any Court on the ground that it is in effect a public vessel.

B. Where the Ambassadorial certificate seeks, as it did in this case, to prove a Governmental fact or the Governmental nature of an act, the Governmental nature of which is challenged by the other party to the litigation.

5. There have been many recent cases in the lower Federal Courts in which both of these points have been taken.

Instances of decisions on the question of immunity are

The Carlo Poma, 259 Fed. 369, now on *certiorari* to this Court, being No. 167 on the October Term, 1920

The Maipo, 252 Fed. 627

The Roseriv, 254 Fed. 154.

Instances of the proof of Governmental acts by Ambassadorial certificates are:

The Adriatic, 253 Fed. 489; 258 Fed. 902

The Athanasios, 228 Fed. 558

Earn Line S. S. Co. v. Sutherland S. S. Co., Ltd.,
254 Fed. 126; 264 Fed. 276.

The cases in which the Ambassadorial certificate has been offered as proof of Governmental acts but have not been dealt with by the Court are:

The Isle of Mull, 257 Fed 798

The Frankmere, 262 Fed. 819.

These two cases are now on appeal in the United States Circuit Court of Appeals for the Fourth Circuit, and it is expected that they will be argued in February, 1920, at the February, 1920, Term of that Court.

An instance where the Ambassadorial intervention was not permitted, although this does not appear in the opinion, was the case of *The Appalachee*, 266 Fed. 923, in the District of South Carolina.

6. Counsel for the respondents in this case has made a motion on this day in the case of *Luzzato & Son v.*

Steamship Pesaro, No. 317 of the October Term, 1920, that that case should be argued at the same time as *The Carlo Poma*, which is No. 167 on the October Term, 1920, Docket.

This motion is made in the present case in order that this case also may be argued at the same time as *The Pesaro*, if the Court grants the motion to advance it, and in any event at the same time as *The Carlo Poma*, which will be reached for argument in ordinary course, as deponent is informed, in the latter part of January, 1921.

7. The reason for this motion to advance this case is that if these three cases are argued together, all the questions of law and practice involved in Ambassadorial certificates will be before this Court and can be passed on definitely by this Court.

To have the decision of this Court on these questions is a matter of great practical importance for the reason that there are many cases other than those above mentioned in which the question of the introduction of an Ambassadorial suggestion or certificate by counsel representing the Ambassador as *amicus curiae* direct is involved and in which also the conclusiveness of such certificate, when admitted, is involved.

Your deponent has personal knowledge of a number of these cases and is concerned in several of them either directly or indirectly.

8. The questions involved in this case are so similar to the questions involved in *The Carlo Poma* and *The Pesaro*, and the questions involved have such gravity, novelty and importance that your deponent is of the

opinion that it would subserve the ends of justice to have the three cases argued together and have this Court definitely pass on the important questions of international law which are necessarily raised in them.

9. In addition to the question regarding the Ambassadorial certificate raised in this case, the case also involves the question whether the Court below properly held that a voyage charter party of a British vessel is frustrated by the requisition of the chartered vessel by the British Government in London, although the charter party was made in the United States; and generally, whether a British Governmental Executive act in fact dissolves a charter party obligation entered into in the United States if it wholly prevents performance of the charter party.

Other litigations are pending involving similar situations and questions which are obviously questions of broad interest and of fundamental importance and it is most desirable that these questions be authoritatively determined as soon as possible. The nature and scope of these questions more fully appear in the petition for certiorari and the opposition thereto filed herein on October 4, 1920, reference to which is hereby made.

10. Counsel for the British Embassy, who have received leave to appear as *amici curiae* herein, have examined and certified that in their opinion this motion is entitled to the favorable consideration of this Court.

Counsel for petitioner also joins in the application.

WHEREFORE it is submitted that it is appropriate that this case should be argued at the same time as *The Carlo Poma*, No. 167 of the October Term, 1920, and it is prayed that this Court may so order.

JOHN M. WOOLSEY,

Sworn to before me this)
19th day of November, 1920(

HARRISON LILLIBRIDGE,

Notary Public,

New York County.

Charles No. 393, Reg. No. 10
Commission expires March 30, 1921

We do hereby certify that we have examined and considered the foregoing motion and, in our opinion, it is well founded and entitled to the favorable consideration of this Court.

FREDERIC R. COUDERT,

HOWARD THAYER KINGSBURY,

Counsel for the British Embassy,

Amici Curiae.

I join in the foregoing application that this case be advanced.

JOHN W. GRIFFIN,

Counsel for Petitioner.

Office Supreme Court, U. S.
FILED

NOV 13 1920

JAMES D. MAHER,
CLERK.

IN THE
Supreme Court of the United States,

OCTOBER TERM, 1920.

No. **555**

THE TEXAS COMPANY,
Petitioner,

vs.

HOGARTH SHIPPING CORPORATION,
LTD., Owner of the Steamship
Baron Ogilvy, and HUGH HO-
GARTH & SONS.

**Motion by Counsel for British Embassy for
Leave to Intervene as Amici Curiae.**

Now come Frederic R. Coudert, Esq., and Howard Thayer Kingsbury, Esq., counsel for the British Embassy in the United States of America, and move for leave to intervene in the above entitled cause as *amici curiae*, and as such *amici curiae* to file a brief and to be heard upon the argument of said cause, upon the following grounds:

1. Upon the hearing of this cause in the District Court of the United States for the Southern District of New York, the undersigned, upon application made at the trial, were permitted to intervene as *amici curiae* on behalf of the British

Embassy, and to present a Suggestion and Certificate avowing the requisition of the *Baron Ogilvy* as the act of the British Government.

2. Upon the hearing of this cause in the Circuit Court of Appeals for the Second Circuit, the undersigned, upon special application duly made therefor prior to such hearing, were permitted again to intervene as *amici curiae* on behalf of the British Embassy, to file a brief and to take part in the argument.

3. In the Courts below and upon the application for the writ of *certiorari* herein the petitioner sought to put in question the legal validity of the requisition of the *Baron Ogilvy* thus avowed by the British Government, and to impeach the verity of the Certificate of the British Embassy and of the Suggestion submitted on its behalf, and to object to the appearance by counsel for the British Embassy as *amici curiae*. It appears from the Brief submitted on behalf of petitioner upon the application for *certiorari* herein that all of the questions thus raised will be presented upon the argument of this cause upon the merits.

4. The practice of an appearance by leave of Court by counsel for a foreign Embassy as *amicus curiae* for the purpose of submitting a Suggestion or Certificate or presenting arguments in support of contentions in which the foreign Government is interested, has been repeatedly followed in this Court, in the Circuit Courts of Appeals for the Second, Third and Fifth Circuits, and in the District Courts for the Southern District of New York, the District of New Jersey, the Eastern District of Pennsylvania, the Eastern District of Virginia and the District of Florida,

and also in various State Courts and in the English Courts. The Certificates and Suggestions so presented or otherwise received in evidence have been taken as verity.

In only two instances known to the undersigned has such an application for leave to appear as *amicus curiae* on behalf of a foreign Embassy been refused. One was in the District of Maryland, in the case of *The Isle of Mull*, 257 Fed. 798, referred to in Petitioner's Brief in support of the application for *certiorari*, and the other was in the District of South Carolina, in *The Apalachee*, 266 Fed. 923. In neither of these cases is the subject mentioned in the opinion.

5. It is of great importance to the British Government that there should be an authoritative decision by this Court upon the propriety of the practice above set forth, and upon the conclusiveness of the Certificate of a foreign representative avowing a given act as the official action of the Government which he represents, and upon the lack of jurisdiction in the American Courts to enquire into the legal validity under the foreign law of governmental acts thus officially avowed; and it is earnestly desired that counsel for said Government, who have been heard in this cause in the Courts below, should have an opportunity to file a brief and be heard upon the argument in this Court also.

Dated November 15th, 1920.

FREDERIC R. COUDERT,
 HOWARD THAYER KINGSBURY,
 Counsel for British Embassy,
Amici Curiae,
 No. 2 Rector Street,
 New York City, N. Y.

U. S. Supreme Court, D. C.
FILED

JAN 12 1921

JAMES D. MAHER,
CLERK.

IN THE
Supreme Court of the United States.

October Term, 1920
No. 555

THE TEXAS COMPANY,

Petitioner,

vs.

HOGARTH SHIPPING CORPORATION, LTD., Owner of
the Steamship *BARON OGILVY*, and
HUGH HOGARTH & SONS.

BRIEF FOR BRITISH EMBASSY.

FREDERIC R. COUDERT,
HOWARD THAYER KINGSBURY,

Counsel for BRITISH EMBASSY,

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2 Rector Street,

New York City, N. Y.



IN THE
Supreme Court of the United States,
OCTOBER TERM, 1920

No. 555

THE TEXAS COMPANY,
Petitioner,

vs.

HOGARTH SHIPPING CORPORATION,
LTD., owner of the steamship
Baron Ogilvy, and HOGARTH &
SONS.

**Brief of Counsel for British Embassy as
Amici Curiae.**

This brief is submitted by counsel for the British Embassy in the United States, as *amici curiae*, pursuant to leave granted by this Court on November 22nd, 1920, upon special application therefor made on November 15th, 1920. A similar intervention was permitted upon the trial in the District Court and again in the Circuit Court of Appeals. It was claimed by petitioner, upon the application for *certiorari* herein, that it was error to permit such intervention, to receive in evidence

the certificate of the British Embassy avowing the requisition of the *Baron Ogilvy* as a governmental act, and to decline to inquire into the legal validity of the requisition thus avowed.

The facts material to the questions thus raised are very simple and are not in dispute.

In February, 1915, the owners of the *Baron Ogilvy* chartered her to the Texas Company (the present petitioner) for a specified voyage to begin between April 15th and May 15th, 1915. On April 10, 1915, the vessel was requisitioned by the British Admiralty for government service and accordingly was not delivered to the charterer. The requisition was effected by a telegram from the office of the Director of Transports. The vessel remained under requisition until October 20th, 1915. Thereafter the Texas Company sued the owners of the vessel for damages for alleged breach of the charter party.

Upon the trial, counsel for the British Embassy presented a Certificate under the seal of the Embassy avowing the requisition as a governmental act, and a Suggestion to the same effect, and represented to the Court that it should not inquire into the fact, the validity or the effects of the requisition, or cast the owners of the vessel in damages for having obeyed the requisition. They were permitted to intervene as *amici curiae* for this purpose, and the Court received the Certificate and Suggestion (Rec., pp. 29-33, 38, 42-44).

The Court dismissed the libel, held that the taking and using of the vessel by the British Government rendered impossible the performance of the agreement embodied in the charter party, and declined to inquire into the validity of the requisition. The Court expressly refrained, however,

from resting this decision upon the conclusiveness of the Embassy Certificate, and referred to the fact that this question was before this Court in the case of *The Gleneden* (*Ex parte* Muir, Oct. Term 1918, No. 28), argued here January 7th, 1919, then and still undecided (Rec., p. 235).

Upon the appeal to the Circuit Court of Appeals substantially the same contentions were advanced by the Texas Company as upon its subsequent application to this Court for *certiorari*. The Circuit Court of Appeals affirmed the decree of the District Court without opinion (Rec. p. 253).

It appears from the application for *certiorari* that upon the hearing of this cause in this Court various questions are at issue between the parties which in no wise affect the interests of the British Government. These will not be discussed in this brief, which will be limited to the presentation of the following points.

Brief of the Argument.

1. The procedure followed in the Courts below in permitting intervention by counsel for the British Embassy as *amici curiae* was proper and in accordance with well established precedent.

2. The official avowal by the British Embassy, by its own Certificate, and the Suggestion of its counsel, conclusively establishes the fact of the requisition of the *Baron Ogilvy* and its governmental character and precludes further inquiry into the validity, legality or effect thereof.

3. The owners of the *Baron Ogilvy* should not be cast in damages for having obeyed the command of their Sovereign in time of war.

POINT I.

The procedure followed in the Courts below in permitting intervention by counsel for the British Embassy as *amici curiae* was proper and in accordance with well established precedent.

The inherent power of a Court to permit intervention by an *amicus curiae* and to receive information from him upon some matter of law in respect of which the Court is doubtful or some matter of fact of which the Court may take judicial notice when so informed, or to afford special opportunity for the presentation of some aspect of a controversy, is too well established to require extensive argument in this Court at this time. As this Court has said:—

“It is within our discretion to allow it in any case when justified by the circumstances.”

See *Northern Securities Co. vs. United States*, 191 U. S. 555,

citing prior instances in

Green vs. Biddle, 8 Wheat. 1, 17

Florida vs. Georgia, 17 Howard 478, 491

The Gray Jacket, 5 Wall. 370.

Such permission may be and has been granted even after direct intervention as a party has been expressly denied.

See *The Employers Liability Cases*, 207 U. S. 463, 490.

Recent instances in which counsel for the British Embassy have been permitted to intervene in this Court as *amici curiae* are

Dillon *vs.* Strathearn Steamship Co., 248

U. S. 182;

Strathearn Steamship Co. *vs.* Dillon, 251

U. S. 348;

Ex Parte Muir (*The Gleneden*) No. 28,

Oct. Term, 1918, argued January 7,

1919, still awaiting decision.

The procedure of an appearance by counsel for a foreign consular or diplomatic representative as *amicus curiae*, for the purpose of laying before the Court by Suggestion or Certificate, or both, facts of an official nature, or presenting legal considerations pertinent to a pending controversy affecting the interests of the foreign government, has been frequently followed in the Federal Courts.

In the Circuit Court of Appeals the following recent instances may be cited:—

Second Circuit—

The Claveresk, 264 Fed. Rep. 276;

The Carlo Poma, 259 Fed. Rep. 369;

Muir v. Chatfield, 255 Fed. Rep. 24.

Third Circuit—

The Adriatic, 258 Fed. Rep. 902.

Fifth Circuit—

The Strathearn, 256 Fed. Rep. 631.

and in the District Courts:—

The Athanasios, 228 Fed. Rep. 558 (S. D. N. Y.);

The Strathearn, 239 Fed. Rep. 583 (N. D. Fla.);

The Maipo, 252 Fed. Rep. 627 (S. D. N. Y.);

The Adriatic, 253 Fed. Rep. 489 (E. D. Penna.);

The Roseric, 254 Fed. Rep. 154 (D. N. J.);

The Claveresk, 254 Fed. Rep. 127 (S. D. N. Y.);

The Santa Cruz, (not reported, E. D. Va., June 28, 1919).

The practice is also recognized in the State Courts and in the English Courts:

See

Nankivel vs. Omsk All Russian Government, New York Law Journal, Oct. 28, 1920;

Marine Transport Service Co. vs. Romanof, N. Y. Law Journal, February 1st, 1918;

The Constitution, L. R. 4 P. D. 39.

Although any private individual, or, as the District Court in the case at bar phrased it, "the first man that comes in off the street" (Rec. p. 32), may be permitted or invited to be heard as *amicus curiae*, the petitioner here contends that this privilege must be denied to a foreign diplomatic representative and that he may gain the ear of the Court only by applying to the State

Department to ask the Department of Justice to cause the desired representations to be made. That this Court has repeatedly permitted the direct intervention now attacked, and is permitting it in the case at bar, is a sufficient answer to this contention.

The other method is also perfectly proper, and is not infrequently followed, but it necessarily involves more circumlocation and delay, and no considered and reported case in any Court has been found in which it has been held to be exclusive.

In *The Luigi*, 230 Fed. Rep. 493, it appears that the District Court had indicated its preference that certain representations made to it "should come through official channels of the United States Government" and that such course was subsequently followed.

In *The Isle of Mull*, 257 Fed. Rep. 798, the District Court upon the trial, in the exercise of its discretion, declined to permit the intervention of an *amicus curiae*, but did not discuss the point in its opinion and proceeded upon the theory that the legal validity of the requisition there involved was immaterial, since there was no dispute that there had been actual interference with the vessel (See p. 802).

In *The Apalachee*, 266 Fed. Rep. 923, where the question was one of immunity, the Court declined to permit intervention, but held the case for some months to await the decision of this Court in *Ex Parte Nuir* (*supra*). Meanwhile the vessel was released on bond, and eventually the case was decided on the merits without further consideration or discussion of the question of intervention.

It is recognized that where the Department of Justice intervenes on behalf of a foreign representative, it does so because it is the prerogative of the United States to subrogate itself a party in the place of the nation concerned.

See

The Pizarro, 19 Fed. Cas., No. 11,199.

Whatever limitations are imposed by custom and precedent upon a foreign representative in dealing with the Government to which he is accredited, formal communications to the Chief Executive or to the State Department do not constitute the whole extent of his functions. He may and does address the public at large and all manner of unofficial bodies and gatherings. He may cause suits to be instituted on behalf of his Government, and his authority to do so cannot be questioned.

See

Republic of Mexico vs. De Arangoiz, 5 Duer (N. Y.) 643, 646;
The Sapphire, 11 Wall. 164, 167.

He may instruct consular officers to intervene in various classes of litigation and such consular intervention is expressly provided for by many treaties.

See

Thompson vs. Rocca, 223 U. S. 317.

The Constitution recognizes his potential standing in judicial proceedings by its grant of original jurisdiction to this Court "in all cases affecting ambassadors, other public ministers, and con-

suls" and its extension of the judicial power of the United States to such cases (U. S. Const. Art. III, Sec. 2).

It would be a strange and irrational limitation upon the privileges of a diplomatic representative to prescribe that when he has official knowledge of an official fact, material in a pending litigation, he may not inform the Court of it directly, but must cause the information to be transmitted through two Executive Departments of the United States Government before it may be allowed to reach its destination, and that although he may appear as a suitor, he may not be heard as a friend. No such disability is imposed upon him by law or custom.

In any event it does not lie in the mouth of a private litigant to make the objection, when the Court is willing to receive the information in this manner. There has been no remonstrance from the Executive branch and even if there were it would not be controlling upon the Court which, as vigorously pointed out by Judge Hough on the trial, sits "as a representative of an independent and equally historical branch of the government of the United States" and takes "no orders from the Secretary of State, and no directions from him" (Rec. p. 33). The petitioner, a private corporation of the State of Texas, has no standing thus to arrogate to itself the functions of a censor of the amenities of diplomatic procedure.

POINT II.

The official avowal by the British Embassy, by its own Certificate, and the Suggestion of its counsel, conclusively establishes the fact of the requisition of the Baron Ogilvy and its governmental character and precludes further enquiry into the validity, legality or effect thereof.

The evidentiary conclusiveness of an Ambassadorial certificate as proof of facts of an official character was recognized in the Courts of the United States in the early days of this Government.

See

United States *vs.* Peters, 3 Dall. 121 (1795).

Here the official character of a French public vessel was established by a certificate of the French Minister.

See also

The Exchange, 7 Cranch. 116;
Dupont vs. Pichon, 4 Dall. 321.

Recent instances in the Circuit Court of Appeals are:

Agency of Canadian Car & Foundry Co.
vs. American Can Co. 258 Fed. Rep.
363; *aff'g* 253 Fed. Rep. 152;
The Carlo Poma, 259 Fed. Rep. 319;
The Claveresk, 264 Fed. Rep. 276.

Numerous cases in the District Courts have been cited under the preceding Point.

The same rule is applied in England.

See

The Parlement Belge, L. R. 5 P. D. 197,
219;

The Constitution, L. R. 4 P. D. 39;

The Crimdon, 35 Times Law Rep. 81;

In the Goods of Anne Dermoy, 3 Hagg.
Eccl. 767;

In the Goods of Klingemann, 3 Swab. &
Tr. 18;

In the Goods of Prince Oldenburg, L. R.
9 Prob. Div. 234.

In *Tucker vs. Alexandroff*, 183 U. S. 424, at p. 441, this Court, quoting with approval from Hall on International Law (§44), said:

“Attestation by a Government that a ship belongs to it is final.”

In the case at bar, there is a solemn attestation by the officially accredited representative of the British government that the *Baron Ogilvy* was requisitioned by it on a certain date and thereafter employed in its service until a certain later date. There is no attempt here to prove by official certificate facts of an unofficial character more properly provable by evidence *in pais*. Nor is the fact in question of such a “political” character as to require the affirmative recognition of the executive branch of the United States Government, as in the case of a change of sovereignty or of territorial boundaries. The question is: “Was the requisition of the *Baron Ogilvy* the act of the British Government”. The British

Government by its diplomatic representative says "It was". There can be no more authoritative source of information or manner of proof of the administrative action of a foreign government within its own territory.

An official fact, when properly brought to the attention of the Court, becomes a subject of judicial notice. No one method of informing the Court is exclusive, and what method is proper or appropriate depends upon the nature of the fact and the circumstances of the case.

See *Talbot vs. Seeman*, 1 Cranch, 1, at p. 38.

The requisition having been solemnly avowed by the British Government, its validity, legality and effect ceased to be proper subjects for contentious testimony or judicial inquiry in an American Court.

It is a commonplace of International Law as recognized by our Courts that:

"The acts done under the authority of one sovereign can never be subject to the revision of the tribunals of another sovereign,"

(Per Story, J., in *The Invincible*, 2 Gall. 29)

This rule has been repeatedly and very recently reaffirmed.

See

Underhill v. Hernandez, 168 U. S. 250;
American Banana Co. v. United Fruit Co., 213 U. S. 347;

Oetjen v. Central Leather Co., 246 U. S. 297;

Ricaud v. American Metal Co., 246 U. S. 304.

The *Baron Ogilvy* was within the territorial jurisdiction of Great Britain when requisitioned and was thus subject, both in law and in fact, to the complete control of that Government. "Force is in reserve behind every State command" (See *British & Ins. Co. vs. Sanday*, 32 Times Law Rep. 266), and the whole power of the British Empire was thus behind the telegram from the Director of Transports. Obedience to the command of the Sovereign was required by every consideration of patriotism, and opposition would have been as disloyal as resistance would have been futile. It was not incumbent upon the owners, and it is not appropriate for any foreign Court, to speculate concerning theoretical limitations upon the prerogative of the British Crown, or to inquire whether in this case the Crown misconceived its powers or exercised them irregularly or omitted some formality contemplated by the Proclamation of August 3, 1914.

If, as petitioner now contends, there was anything irregular or *ultra vires* in the original action of the Admiralty, it was cured by the ratification involved in the Government's subsequent avowal of it through the Embassy as an "Act of State."

See

O'Reilly de Camara v. Brooke, 209 U. S. 45, 52;

United States v. Heinzsen & Co., 206 U. S. 370, 385;

Buron v. Denman, 2 Exchequer, 166.

In the face of this ratification and of the rule that "the Courts of one independent government will not sit in judgment on the validity of the acts

of another done within its own territory" (*Ricaud vs. American Metal Co.*, 246 U. S. at p. 309), it is of no avail to argue, as petitioner does, that the telegram from the Director of Transports was not equivalent to a warrant from the Secretary of the Lords Commissioner of the Admiralty or a Flag Officer of the Royal Navy. The power to requisition existed, and the act was done in British territory. That is sufficient for "this or any other American Court" (*Oetjen vs. Central Leather Co.*, 246 U. S. at p. 304).

POINT III.

The owners of the *Baron Ogilvy* should not be cast in damages for having obeyed the command of their sovereign in time of war.

If there was any duty or obligation owed by the owners of the *Baron Ogilvy* to the petitioner, the performance of which was not prevented by the requisition, and which such owners have failed to perform, it is not for the representatives of the British Government to advance any arguments on the subject. Whether the requisition did or did not work a complete "frustration" of the commercial adventure contemplated by the parties, and render performance of the charter party "impossible" in the legal sense, is an issue with which the British Government is not concerned, provided that the fact and the validity of its requisition are not brought into question.

It is, however, appropriate for the British Government to urge that its subjects should not be

muleted in damages for having obeyed its orders and yielded the *Baron Ogilvy* to its requisition, when the fate of civilization was hanging in the balance, the submarine was harrying the merchant fleet, and England was rallying her volunteers, from home counties and Dominions overseas, to strengthen the ranks of her hard pressed forces by the Yser and the Aisne.

No contractual relations with private parties could place upon the British owners of this British vessel a higher obligation in law or in ethics than their duties of loyalty and allegiance to their Sovereign and obedience to his commands.

Conclusion.

So far as the review sought by petitioner attacks the intervention on behalf of the British Embassy, or the effect of the Suggestion and Certificate, or puts in question the fact or the validity of the requisition of the *Baron Ogilvy*, or asks damages against her owners by reason of their obedience to such requisition, the decree should be affirmed.

Respectfully submitted this 10th day of January, 1921.

FREDERIC R. COUDERT,
HOWARD THAYER KINGSBURY,
Counsel for British Embassy,
Amici Curiae,
No. 2 Rector Street,
New York City, N. Y.

FILED

JAN 14 1921

JAMES D. MAHER,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 555.

THE TEXAS COMPANY,
Libelant-Petitioner,
against

HOGARTH SHIPPING CORPORATION, LTD., owner of
the steamship *Baron Ogilvy*, and HUGH HOGARTH
& SONS,
Respondents.

BRIEF FOR PETITIONER.

HAIGHT, SANDFORD, SMITH & GRIFFIN,
Proctors for Petitioner.

JOHN W. GRIFFIN,
Counsel.

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Supreme Court of the United States

THE TEXAS COMPANY,
Libelant-Petitioner,

against

HOGARTH SHIPPING COMPANY,
LTD., Owner of the Steamship
Baron Ogilvy, and HUGH HO-
GARTH & SONS,

Respondents.

October Term,
1920—No. 555.

This case comes up on writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review a decision of that Court affirming the dismissal of the libel herein.

The suit was brought in admiralty, in the District Court for the Southern District of New York, by The Texas Company, charterer of the British steamship *Baron Ogilvy*, against the respondents, owners of the steamship, to recover damages for breach of a charter-party. The parties are referred to in this brief as "charterers" and "owners," respectively. The breach complained of was the owners' absolute refusal to perform, and repudiation of, the charter-party. The principal defense was that the vessel had been prevented from performance by an alleged requisition of the British Government. The District Court upheld this defense and dismissed the libel (Opinion, Record, pp.

234-238; 265 Fed., 375). The Circuit Court of Appeals affirmed without opinion (Record, p. 253).

Statement of Facts.

1. *The Charter-party.*—The charter-party in suit is a rate charter, executed at the City of New York on February 6, 1915. It is printed in the record at pages 150-158. By it the owners chartered one of their vessels (to be named later) for a voyage from Port Arthur, Texas, "to a port between Cape Town and Delegoa Bay, both inclusive," with a full cargo of refined petroleum, at an agreed rate of freight. Subsequently the steamship *Baron Ogilvy* was named.

The charter is unusual in that it does not contain the clause, so common in shipping documents, excepting "restraints of princes, rulers and people." Since the contract was made at a time when the war had been in progress for six months, this omission is especially worthy of notice. Not only did the charter omit this all but universal clause, but it contained a special clause indicating that it was to be performed even though performance could not be rendered at the expected time. This clause reads as follows (pp. 152-153, fols. 456-457):

"The lay days for loading are not to commence before April 15th, 1915, except with the consent of the Charterers or their Agents, and if the vessel is not ready to load by two o'clock P. M. on May 15th, 1915, the Charterers shall have the option of cancelling or maintaining this charter, their decision to be given at once, if the vessel be then at the loading port; but if the vessel has not then arrived their decision need not be given until twenty-four hours after arrival."

It appears from the foregoing that the charter was not one for a voyage to be performed at any exactly specified time. The charterers had on May 15th an option of "cancelling or maintaining" the charter, but it was expressly provided that they need not exercise that option until the vessel reported for loading. The charterers were, of course, entitled to require her to report and, if they so desired, to perform the charter, at a period later than May 15th.

This was, therefore, an American contract for a voyage from an American port, made in New York, between an American citizen and British citizens, at a time when Great Britain was involved in the war and the United States was neutral; it contained the clause referred to above, indicating that the owners were to carry out their contract at any time, even later than the expected time, unless the charterers, upon tender of the vessel to load, should elect to cancel; and it constituted an absolute contract to carry the cargo, since it contained no restraints of princes clause, much less any clause making it void in case of requisition. The omission of these clauses is significant. At the time when the charter was executed, the war had been in progress for over six months; numerous vessels had already been requisitioned by the British Government, including apparently a number of vessels belonging to these same owners, though the precise dates of these requisitions do not appear in the record (see Hogarth, pp. 47, 54, fols. 139, 140, 160). At the outbreak of the war the British Government had, by proclamation, announced its intention of requisitioning British vessels as required (see Proclamation, p. 14 of Record). This proc-

lamation was notice to all the world. From that time forth requisitioning was constantly practised. One of the officials of the Admiralty testified (p. 82, fol. 244) :

"Q. Since the outbreak of the war, I need scarcely ask, you have requisitioned a very large amount of British tonnage? A. A very large amount."

It is inconceivable that the possibility of requisition could have been absent from the minds of the parties. Moreover, it specifically appears that war conditions were in their minds from the insertion in the charter of certain special clauses having to do with war conditions (pp. 156-158, fols. 468-473). These provided in substance that the ship should have the right to obey any orders given by the British Government as to routes and other incidents of the voyage; should be employed only in trades lawful for a British ship; should not carry cargo which would expose her to seizure by the Allies; and should not violate any of the warranties in her war risk policies, which warranties provided in effect that the instructions of the British Government should be followed as to routes, ports of call, time of starting, etc., and that the ship should not enter a blockaded port (pp. 157-158, fols. 470-472).

2. *The Alleged Requisition.*—The answers alleged that, on April 10, 1915, while at London, the *Baron Ogilvy* "was requisitioned by the Government of the Kingdom of Great Britain and Ireland for Government service, under and pursuant to the general prerogative of the British Crown and in pursuance of the Royal Proclamation, dated August 4, 1914" (p. 10, fol. 29; p. 21, fol. 63). The answers further set forth that this alleged requisition constituted "a restraint of princes" (p. 11,

fol. 31; p. 22, fol. 64), and that by reason thereof the "charter-party became impossible of performance" (p. 11, fol. 31; p. 22, fol. 65).

Certain other defenses were pleaded, which were not sustained by the Courts below. These are briefly discussed at pages 18-20, *infra*. The real question in the case is, however, the validity of the requisition defense, already referred to.

The facts with regard to the alleged requisition may be summarized briefly as follows:

The owners' proof showed that the Royal Proclamation referred to in the answers purported to authorize the Lords Commissioners of the Admiralty "by warrant under the hand of their Secretary or under the hand of any Flag officer of our Royal Navy holding any appointment under the Admiralty, to requisition and take up for Our Service any British ship, etc." (p. 205, fols. 613-614).

No such proceeding as this was ever had. The alleged requisition consisted solely of a telegram sent to the owners on April 10, 1915, by Mr. Ernest J. Foley, an Assistant Director of Transports in the service of the British Admiralty. This telegram read as follows:

"Hogarth Glasgow SS *Baron Ogilvy* is requisitioned under Royal proclamation for Government service.

TRANSPORTS."

This telegram was all that was ever done by way of requisition.

At this time a correspondence was in progress between the Admiralty and the owners, as a result of which a voluntary agreement was entered into whereby, in place of the alleged requisition, the owners chartered the vessel to the British Govern-

ment, at a freight higher than the requisition rate, *for a series of four trans-Atlantic voyages*. As soon as this was done, the owners wholly repudiated the charter and notified the charterers (on April 12, 1915) that they would not perform it *at all*.

The four trans-Atlantic voyages, for which the owners chartered the vessel to the British Government, were expected to take, and did take, more than six months; and, on their conclusion, the vessel was released from Government service. This was in October, 1915 (Foley, p. 85, fol. 253; Hogarth, p. 65, fol. 193). The vessel was never tendered to the charterers for service under the charter (Hogarth, p. 65, fol. 193; p. 7, fol. 19). It further appeared that one term of the agreement between the owners and the British Government was that the Government agreed to protect and indemnify the owners against such claims as the present (p. 60, fol. 179).

3. *The Owner's Voluntary Charter for Four Trans-Atlantic Voyages.*

In order fairly to present the questions involved, a fuller statement is necessary regarding the correspondence which resulted in the agreement between the owners and the British Government that the vessel should make the four trans-Atlantic voyages.

On March 31st, the owners received an intimation that the vessel might be requisitioned. This was in the form of a telegram sent by a firm of ship brokers "on behalf of the Admiralty" (Hogarth, p. 49, fol. 145). The telegram read:

"Admiralty Note *Baron Ogilvy* in London may require requisition her please post plan say when expect discharged" (p. 166, fol. 498).

On April 1st an inquiry was made on behalf of the Admiralty (p. 168, fol. 502) by Hogg & Robinson, the Admiralty's agents (Hogarth, p. 49, fol. 147), for vessels

"capable of carrying from about 4,000 to 6,000 tons, measurement, of hay."

The letter goes on to say:

"they will be required on this service *for some weeks* and as the next vessel is wanted to commence loading at Belfast on the 6th instant or as soon after as possible, we shall be obliged if you will kindly send us a wire, on receipt, for the information of the Admiralty authorities." (The italics in the above and in the following extracts from this correspondence are ours.)

Hogarth testified (pp. 49-50, fols. 147-148):

"Q. How did Messrs. Hogg & Robinson come into it? A. They were Admiralty agents. Their paper is headed 'Admiralty Shipping Agency.' They represent the Admiralty in the city for procuring tonnage and arranging shipments of stores for the government.

Q. And their purpose was to get the vessel for the government for the purpose of carrying hay, apparently? A. Yes."

On April 6th, the owners replied that their only vessel of the type in question in or shortly due in England was the *Baron Ogilvy* (p. 172, fol. 515).

On April 9th, Harley & Company, who were ship brokers, telegraphed to the owners as follows:

"*Baron Ogilvy*. Referring to Admiralty notice requisition we believe could induce them take her instead for 3 or 4 trips New Orleans Avonmouth or Liverpool £14 namely £13.10.0, 10 shillings gratuity. Shall we try to do so?"

On the same date, Harley & Company wrote the owners as follows (pp. 174-175, fols. 522-523) :

"With reference to notice of requisition by the Admiralty of this steamer, *we believe it would suit their purpose just as well if they were to charter her* for voyages from New Orleans to Avonmouth or Liverpool for Mules, at £13.10.0 and 10/. gratuity for three or four trips and *we believe if you were to authorise us to approach them that we could arrange this matter.*

The conditions of course would be the same that are obtaining in the case of your other steamers running under charter to the Admiralty for this mule business.

We await your views on the matter."

Also on April 9th, Messrs. Harley & Company addressed a letter to the Director of Transports reading as follows (p. 178, fols. 532-534) :

"*Baron Ogilvy.*

Now London expected discharged Monday.

With reference to your verbal notice of requisitioning this steamer, we beg to say that *if it would suit your purpose equally well to charter her for four trips* from New Orleans to Avonmouth or Liverpool for the conveyance of Mules, that *owners would be agreeable* (you nevertheless remaining responsible for any third party claims as under requisition) to undertake that employment on being paid freight at the rate of £13.10. per head of mule put on board, plus 10./ gratuity on the number landed alive.

Owners undertake all the fittings, foddering, electric light, wireless telegraphy, to supply attendants etc. in the usual manner as they are doing in the case of the other 'Baron' steamers at present under your employment, and they would do their best to carry out this work to your satisfaction.

In the event of your agreeing to this proposal the steamer would fit up at New Orleans to carry as much mules as possible under the supervision of your Officer there.

If this suggestion meets your approval we shall be glad of an early reply owing to the prompt position of the steamer in order that owners may make the necessary arrangements."

It will be noted that this is distinctly put forward as a proposition of *voluntary charter in lieu of requisition*.

On April 10th, the telegram constituting the alleged requisition, which is quoted above (p. 5), was sent to the owners. On the same day Harley & Company wrote to the Director of Transports a letter proposing a charter for four trips New Orleans to Avonmouth or Liverpool, which was practically a copy of their letter of April 9th quoted above. It contained, however, the following post-script (p. 184, fol. 551) :

"We estimate this steamer's position would be as under

1st voyage ready	New Orleans	about 16th May
2nd " " "	" "	about 30th June
3rd " " "	" "	about 15th August
4th " " "	" "	about 1st October."

It is therefore plain that this proposal was made with deliberate knowledge that it would be the end of October before the vessel could complete the four voyages.

This offer was accepted by the Director of Transports in a telegram dated April 10th and reading as follows:

"Your offer *Baron Ogilvy* four voyages conveyance of mules New Orleans to Avonmouth or Liv-

erpool freight thirteen pounds ten shillings per head gratuity ten shillings each animal landed alive is accepted stop please say when and where ship can be inspected."

On the same date the owners wrote Harley & Company ratifying and approving the terms of the offer made to the Director of Transports and stating (p. 186, fol. 557) :

"We asked you in our wire to make arrangements to have her taken up on the 'per head mule' basis, for four trips, as we prefer it to the 11/. Time Charter, and no doubt we will have word from you shortly that this has been arranged."

On April 12th the owners wrote Harley & Company that they noted the acceptance of the proposed mule charter by the Admiralty and that they were accordingly proceeding to fit the vessel for the service. The formal letter of confirmation from the Director of Transports appears at folios 568 to 572. The material portion of it reads as follows:

"With reference to your letter of the 10th instant and in confirmation of my telegram of the same date, I beg to inform you that your tender of the S.S. *Baron Ogilvy* is accepted for the conveyance of 672 mules from New Orleans to Avonmouth or Liverpool for four voyages, the first homeward sailing to be about 16th May."

There followed certain conditions of acceptance in which the compensation is fixed at £13.10.0 for each animal shipped plus 10/. for each animal landed.

"conditions to be as at present operative in the case of other vessels belonging to Messrs. Hogarth & Sons engaged in this service."

Hogarth, the owners' manager, testified that the *Baron Ogilvy* was employed by the Government under "a special bargain" (p. 59, fol. 177). One provision of the bargain was that the Government undertook to indemnify the owners against claims on the vessel's commitments (p. 60, fol. 179).

On the same day (April 12th) the owners repudiated the charter in suit. This was done by a letter written to the charterer by the owners' agents in New York, giving notice, not that performance of the charter would be delayed, but that it would not be performed *at all*. The letter read as follows (pp. 34, 35, fols. 102-103) :

"*Baron Ogilvy*. Referring to this steamer's charterparty, dated at New York February 6th, 1915, kindly be advised that we are this morning in receipt of the following cable from Glasgow :

'*Baron Ogilvy* requisitioned.'

This means that the steamer has been commandeered by the British Admiralty and will therefore not be able to carry out charterparty with you."

Hogarth testified (p. 65, fol. 193) that he considered that he had "no liability to the Texas Company."

The charter being thus repudiated, the charterers proceeded to secure other tonnage (Answer to Second Interrogatory, p. 35, fol. 104).

The terms thus secured for the mule trade were more favorable to the owners than the regular requisition rate. The latter was 11 shillings per dead-weight ton per month on a time charter basis (p. 71, fol. 211). The owners clearly expressed their preference for the freight payable for carrying

mules (p. 40, fol. 119; p. 186, fol. 557). This netted, according to Hogarth (p. 71, fols. 211, 212), £100 to £200 a month more than the regular 11 shilling rate.

The carriage of the mules under the agreement thus reached with the Admiralty was evidently more profitable to the owners than the performance of the petitioner's charter would have been. Under that charter, the vessel would have carried 180,000 cases of oil (Hogarth, p. 71, fol. 211) at the charter rate of 47 cents per case (p. 151, fol. 452), thus earning \$80,600 in a period estimated by Hogarth (p. 55, fol. 164) at three and one-half months—say \$23,000 gross per month. At the end of the voyage the vessel would have been in the remote ports of South Africa. Under the mule charter the vessel actually carried on her four voyages 804, 902, 903 and 904 mules respectively—a total of 3,513 (Thompson, p. 140, fol. 418). This made a total freight, at £14 a head, of £49,182, or \$236,073.62, taking the exchange at \$4.80. The voyages occupied about seven months. The monthly earnings were therefore \$33,724.80; about \$10,500 per month, or over \$310 per day, in excess of the sums which would have been earned under the oil charter. Also war risk was carried by the Government (p. 72, fol. 214). While it is quite true that out of these earnings the owners paid for fittings, attendants and fodder, it seems perfectly clear that the net return far exceeded that under the oil charter—to say nothing of the advantage of having the vessel in North Atlantic waters at the expiration of the service. Certainly the above figures show that Hogarth's testimony that he would have made "infinitely more" (fol. 164) un-

der the petitioner's charter, and that he sustained "a very great loss" (fol. 212) in the Admiralty's service, is wholly incorrect.

It is also plain that the oil charter was below the market, since on April 14th it cost the charterer 66 cents per case to secure other tonnage (fol. 445), as against the rate of 47 cents in the *Baron Ogilvy's* charter. Altogether, it is clear that the oil charter could have had few attractions for the owners.

Six things appear from the foregoing testimony and correspondence: (1) The alleged requisition was made in a manner which did not even remotely approximate the method prescribed by the Royal Proclamation pleaded in the answers and quoted at page 5, *supra*. (2) The vessel was employed, not technically under any requisition at all, but under a voluntary charter. (3) Her freight rate with the Admiralty under this voluntary charter was in excess of the usual requisition rate and in excess of the petitioner's charter rate. (4) The only evidence as to the probable length of the service under the alleged requisition is that contained in the letter of April 1, 1915, quoted above, in which the Admiralty's representatives state that vessels were desired to carry hay "*for some weeks*" and to load at Belfast on April 6th or shortly after. (5) The vessel's cancelling date was still five weeks off. (6) The owners, at their own instance, made a charter which they *knew* was going to last at least until the end of October, thereby making it certain that the vessel, instead of being released at the end of "some weeks" (which might mean three or four weeks), was going to be retained for *at least six and one-half months*. Having thus deliberately entered into an engagement which was certain to occupy their vessel for six or seven

months (but which had the advantage of giving them better freights), they informed the charterers that they were not going to perform the charter sued on. This information was given by letter dated New York, April 12th, and was presumably based on a cable sent from London on the 11th, the very day after the charter to the Admiralty had been concluded.

4. *Intervention of British Ambassador.*

At the trial in the District Court, the British Ambassador appeared by counsel as *amicus curiae*. He (1) requested the Court to decline jurisdiction of the case, which the Court refused to do (Record, pp. 30, 31), and (2) offered a certificate and suggestion, which were received in evidence (p. 38, fol. 113). They are printed at pages 42-44 of the record, and they set forth, in substance, that the *Baron Ogilvy* was requisitioned by the British Government; "that from and after the date of requisition the steamship *Baron Ogilvy* was continuously in the service of the British Government and was operated solely under the orders and direction of the British Admiralty until October 20th, 1915"; that the requisition was a governmental act; "and that neither the fact of said requisition, nor its effects, should be inquired into by this Court." Counsel for the charterers objected and excepted to the introduction in evidence of these documents (pp. 39, 40, fols. 117, 118). Counsel for the charterers also objected to any intervention in the case by the British Ambassador (p. 33), on the ground that communications from the diplomatic representative of a foreign power should come, if at all, through the Department of State. The District Court ruled to the contrary (pp. 32, 33, fols. 95-99).

It will be seen from the foregoing statement of facts that the chief questions presented are:

1. Where a charter-party in the present form is made in the United States and its enforcement is sought in a court of the United States, is it a defense to say that performance has been prevented by British law or by the British executive?

2. Does the mere fact of requisition, without evidence that the performance of the contract will be inordinately delayed, terminate the charter?

3. Can the owner of a requisitioned ship voluntarily substitute for the requisition, which might end at any time, a charter whose performance is *certain* to require six or seven months and then claim that he is thereby released from the vessel's previous commitments?

4. Was there a requisition at all in the present case?

A negative answer to any one of these questions will establish the charterers' right to recover.

The offer of the Ambassador's certificate and suggestion also raises questions in connection with the third and fourth of the above inquiries as follows:

1. Is such a communication, not under oath, not based on personal knowledge, and not subject to cross-examination, admissible at all?

2. Is such a communication properly made by a foreign diplomatic representative directly to the Court, or should it come through the Department of State?

3. If the communication is admissible at all, is it conclusive on an American litigant in an American court?

4. Do the certificate and suggestion in the present case, phrased as they are, constitute an assertion that the *Baron Ogilvy* was in fact under requisition during the period from April to October, 1915?

The following questions are also presented:

If a charter is made of a vessel to be named, and the vessel subsequently named becomes unavailable by reason of requisition, does any duty rest upon the shipowner to substitute another vessel?

If a vessel which is under charter is requisitioned, does not the owner owe the charterer a duty to make reasonable efforts to secure her release or, failing that, to substitute another vessel?

Specification of Errors.

The assignments of error are printed at pages 243 to 248 of the record. Without stating them at length, the petitioner alleges that the opinion and decree below are erroneous in the following principal particulars:

(1) In holding that it is immaterial whether or not there was a valid requisition, and in failing to hold that there was no valid requisition (Assignments 1 to 3, p. 243).

(2) In holding that the British Government took and used the *Baron Ogilvy* at the time when the charter should have been performed, and that such use was *in invitum* (Assignments 4, 10, pp. 243-244).

(3) In holding that the alleged requisition by the British Government and the alleged use of the

vessel thereunder extinguished the obligation of the contract (Assignments 17 to 23, 25, 26 and 27, pp. 246-247).

(4) In holding that the obligation of the charter, which was an American contract, was dissolved by the alleged act of the British Government (Assignments 17 to 23, 25, 26 and 27, pp. 246-247).

(5) In holding that, for the purposes of this suit, upon the alleged requisition the *Baron Ogilvy* became non-existent (Assignment 24, p. 247).

(6) In failing to hold that the service of the vessel with the British Government was under a voluntary agreement which prolonged the period of such service to between six or seven months and that the use of the vessel for such service did not excuse the respondents from their charter obligation (Assignments 4, 8, 10, pp. 243-244).

(7) In failing to hold that, even if there was a requisition, that fact did not constitute a defense, in view of the terms of the contract and the circumstances under which it was made (Assignments 16 to 27, pp. 246-247).

(8) In failing to hold that the respondents were under obligation to use proper efforts to prevent the alleged requisition and to obtain the release of the vessel and that they failed to do so (Assignments 6, 7, 9 and 15, pp. 244-245).

(9) In failing to hold that the respondents should have tendered another vessel to the petitioner if and when the *Baron Ogilvy* became unavailable (Assignments 11 to 14, p. 245).

(10) In receiving in evidence the certificate and suggestion of the British Embassy (Assignments 28 and 29, p. 247).

And generally in holding that, under the circumstances of this case, the action of the British Government, such as it was, relieved the respondents from all obligation to perform the charter.

POINTS.

FIRST.

In the absence of a restraints of princes clause, the shipowners' obligation under the charter-party was absolute, and prevention by foreign law was not a defense.

1. Where a shipowner enters into an absolute covenant to carry a cargo, without protecting himself by exceptions, he is bound to perform it or to pay damages.

The practice of embodying certain exceptions in contracts of carriage is so common that one almost unconsciously assumes that a carrier is not liable for non-performance due to causes commonly covered by exceptions. Nevertheless, the law both in this country and in England is plain that the carrier is liable on his covenant unless he has protected himself by exceptions. Indeed, if this were not true, there would be no object in having exceptions.

An examination of the charter in suit (Record, pp. 150-158) shows that it contains no exception whatever applicable to the situation. The owners

in their answers (pp. 8, 9, fols. 23-28) undertake to set up certain clauses attached to the charter for insurance purposes, none of which, however, cover this case. It is, for example, provided (p. 156, fol. 468) that bills of lading issued for the cargo shipped under the charter shall contain a clause permitting the ship to comply with the orders of the British Government or of the War Risk Insurance with regard to routes, times of sailing, etc. These provisions do not purport to cover a refusal to sail at all, and obviously they have no application whatever to the present case, since no bills of lading were ever issued.

The other conditions referred to appear at pages 157, 158, folios 470-473, and are to the effect that the vessel's trades must be such as are lawful for British ships; that she shall not be used for such cargo as would expose her to seizure or condemnation by the Allies; and that there shall be no breach of the warranties contained in the vessel's war risk policies, namely, that she shall comply so far as possible with the orders of the British Government and of the War Risk Insurance Committee with regard to such details of the voyage as route, ports of call and stoppages; that she shall not sail if ordered not to; that she shall leave enemy ports within the days of grace allowed by the enemy; and that she shall not enter a blockaded port. Obviously these provisions have to do with the manner of performance of the charter and are wholly inapplicable to a situation where the charter has been repudiated and never performed at all. Clearly they do not apply to the present case, and the District Court properly so held, saying (fols. 702-703):

"The parties executed a charterparty containing no restraints of princes clause—and (as I construe the document) no other clause or rider thereof authorizing either party to invoke the line of decisions construing and enforcing that phrase."

The following cases show the extent of the carrier's liability under such a contract:

In *Spence v. Chodwick*, 10 Q. B., 517, certain goods were shipped by the plaintiff on the defendant's vessel from Gibraltar for London. There were certain exceptions not including restraints of princes. The declaration alleged shipment and non-delivery; the defendant pleaded that the goods had been seized and condemned by the Spanish authorities. This plea was held bad on demurrer. The Court said, per Patteson, J., at page 528:

"The defendant's contract is to carry the plaintiffs' goods to London and he is liable for non-performance of his contract unless its performance was prevented by some of the exceptions provided against or by the act of the plaintiffs themselves or by the law of this country."

Per Wightman, J., page 530:

"The defendant here was prevented by unavoidable necessity from performing his contract. But he might have provided in his contract against the consequences of such a contingency; he has not done so and is without excuse."

This decision was followed in *Jacobs v. Credit Lyonnais*, L. R. 12 Q. B. D., 589 (p. 34, *infra*), and was approved by this Court in *Howland v. Greenway*, 22 How., 491, where a shipment of cargo was made at New York for Rio de Janeiro and

was not delivered because it was seized by the Brazilian authorities in consequence of the master's failure to comply with the local customs regulations. This Court held that the shipowners' liability was absolute, saying (p. 502):

"Their contract is an absolute one to deliver the cargo safely, *the perils of the sea only excepted*. Under such a contract *nothing will excuse them for a non-performance except they have been prevented by some one of these perils, the act of the libellant or of the law of their country*. No exception of a private nature which is not contained in the contract itself can be engrafted upon it by implication as an excuse for non-performance."

The opinion refers to *Spence v. Chodwick*, *supra*, with approval for the proposition that:

"When a party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may notwithstanding any accident by inevitable necessity because he might have provided against it by his contract."

In *The Harriman*, 9 Wall., 161, a vessel was chartered to carry a cargo of coal from San Francisco to certain South American ports to be named. Valparaiso was named. The coal was in fact destined for the Spanish navy. When the vessel reached South American waters, the Spanish navy had departed for an unknown destination, and the master returned to San Francisco. This Court held the shipowner liable, saying:

"The existence of the war was known to both parties when the contract was entered into. The owner made no provision against any contingency. His engagement was simple, direct and unconditional that the vessel should proceed to Valparaiso.

The presence or absence of the consignee was immaterial. * * *

The answer to the obligation of hardship in all such cases is that it might have been guarded against by a proper stipulation. It is the province of courts to enforce contracts, not to make or modify them. When there is neither fraud, accident, nor mistake, the exercise of dispensing power is not a judicial function."

So, where by force of foreign law, a charterer is unable to furnish cargo at the loading port, he is liable, unless the contract contains a proper exception.

Blight v. Page, 3 Bos. & P., 295.

Barker v. Hodgson, 3 Maule & S., 267.

Northern Pacific R. R. Co. v. American Trading Co., 195 U. S., 439, was a case where, during the war between China and Japan, a consignment of lead, destined for Japan, was not carried forward because a deputy collector of customs refused clearance to the vessel having it on board, under the mistaken idea that it was contraband and could not lawfully be shipped. The carrier was held liable for failure to transport the lead.

In *Ashmore v. Cox*, L. R. 1899, 1 Q. B. D., 436, the contract was for shipment of 250 bales of Manila hemp at a certain time. Owing to the Spanish-American War, the shipment could not be made at the time fixed, but the seller was held liable in damages for his failure to ship. The Court (Lord Russell, C. J.) said:

"On behalf of the defendants it was also contended that they were excused from the fulfillment

of the contract on the ground of impossibility of performance. This contention was divided into two heads. First, it was said that it was an implied condition of the contract, and therefore not depending upon the express words of the contract, that it should be possible to ship between the named dates by sailer or sailers. * * *

The defendants have taken upon themselves the absolute responsibility of being able to make a declaration complying with the contract and appropriating to the contract 250 bales of the commodity shipped by sail or sailers between May 1st and July 31st, 1898. They have taken upon themselves (subject to the concluding clause of the contract) the responsibility that those events shall take place, or that they will pay damages if from any cause they are prevented from carrying out the contract. I therefore hold that there was no such implied condition."

This decision has recently been approved in *Blackburn Bobbin Co. v. Allen*, 1918, 1 K. B., 540.

So, too, in *Sun Printing Assn. v. Moore*, 183 U. S., 642, this Court said that it was a well settled rule of law that, if a party by his contract has charged himself with an obligation possible to be performed, he must make it good unless its performance is rendered impossible by the act of God, the law, or the other party.

This passage was recently quoted with approval in *Carnegie Steel Co. v. United States*, 240 U. S., at 165.

In *Chicago, Milwaukee etc. Ry. Co. v. Hoyt*, 149 U. S., 1, at 14, this Court said:

"There can be no question that a party may by an absolute contract bind himself or itself to per-

form things which subsequently become impossible, or to pay damages for the non-performance, and *such construction is to be put upon an unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract*, or where the impossibility arises from the act or default of the promisor. But where the event is of such a character that it cannot be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens."

In commenting on the above language, this Court in *Columbus Railway & Power Co. v. Columbus*, 249 U. S., 399, at 412, said: "

"Particular reliance is had upon the last sentence of the paragraph just quoted. This language was used in interpreting a contract of doubtful import, as the context shows. Such interpretation was made in view of the situation of the parties at the time when the contract was made, and in view of the nature of the undertaking under consideration. *It certainly was not intended to question the principle, frequently declared in decisions of this court, that if a party charge himself with an obligation possible to be performed, he must abide by it unless performance is rendered impossible by the act of God, the law, or the other party.* Unforeseen difficulties will not excuse performance. Where the parties have made no provision for a dispensation, the terms of the contract must prevail. *United States v. Gleason*, 175 U. S. 588, 602, and authorities cited; *Carnegie Steel Co. v. United States*, 240 U. S. 156, 164, 165."

It is plain enough that in the present case the very obvious contingency of requisition might readily have been anticipated and guarded against in the contract.

Numerous other decisions to the same effect might be cited; for example, *Ingle v. Jones*, 2 Wall., 1, where a builder failed to complete his work as agreed because of a latent defect in the soil upon which the foundation rested which made it necessary to take down and reconstruct a considerable part of the building. This Court said:

"This covenant it was his duty to fulfill, and he was bound to do whatever was necessary to its performance. Against the hardship of the case he might have guarded by a provision in the contract. Not having done so, it is not in the power of this court to relieve him. He did not make that part of the building 'fit for use and occupation.' It could not be occupied with safety to the lives of the inmates. It is a well settled rule of law, that if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him. *Beebe v. Johnson*, 19 Wend., 500; *Paradine v. Jayne*, Alleyn, 27; *Beal v. Thompson*, 3 Bos. & P., 420; 3 Com. Dig., 93."

So in *United States v. Gleason*, 175 U. S., 588, at 602, this Court said:

"While we are to determine the legal import of these provisions according to their own terms, it may be well to briefly recall certain well-settled rules in this branch of the law. One is that if a party by his contract charge himself with an obligation possible to be performed, he must make

it good, unless his performance is rendered impossible by the act of God, the law, or the other party. Difficulties, even if unforeseen, and however great, will not excuse him. If parties have made no provision for a dispensation, the rule of law gives none, nor, in such circumstances, can equity interpose. *Dermott v. Jones*, 2 Wall. 1; *Cutter v. Powell*, 6 T. R. 320."

And in *Jones v. United States*, 96 U. S., 24, this Court said:

"Impossible conditions cannot be performed; and if a person contracts to do what at the time is absolutely impossible, the contract will not bind him, because no man can be obliged to perform an impossibility; but where the contract is to do a thing which is possible in itself, *the performance is not excused by the occurrence of an inevitable accident or other contingency, although it was not foreseen by the party, nor was within his control.*"

In *Berg v. Erickson*, 234 Fed., 817, the Circuit Court of Appeals for the Eighth Circuit reviewed the authorities at length and there held that an unusual drought did not relieve from a contract to furnish grass for cattle, there being no exception covering the case.

In *Rederiaktiebolaget Amie v. Universal Transp. Co., Inc.*, 250 Fed., 400, the Circuit Court of Appeals for the Second Circuit said:

"No action of the Swedish Government would excuse the defendant from its covenant to do so" (i. e., to deliver a bill of sale), "there being no exception in the agreement like that common in charterparties and bills of lading of arrests and restraints of princes."

A recent case on the subject in New York is that of *Richards v. Wreschner*, 174 N. Y. App. Div., 484, where a contract made in this country by a German firm to deliver in this country merchandise manufactured in Germany was held, in the absence of a proper exception, not to be excused by the outbreak of war between Germany and Belgium. The Court adopted the statement of the New York Court of Appeals in *Cameron-Hawth Realty Co. v. City of Albany*, 207 N. Y., 377, as follows:

"When a party by his own contract creates a duty or charge upon himself, he is bound to a possible performance of it because he promised it and did not shield himself by proper conditions or qualifications."

The converse case is illustrated by *Furness, Withy & Co. v. Rederi Banco*, 1917, 2 K. B., 873, where a Swedish ship was chartered to an English firm by a charter-party made in England and containing an exception of restraints of princes. According to Swedish law, the vessel could not lawfully perform the charter because under it she was to carry cargo between two ports both lying outside of Sweden. The Court held that this law constituted a restraint of princes within the meaning of the exception and that therefore the owner was not liable; but it is made clear in the opinion that, if the exception had been absent, the decision would have been to the contrary. The Court said at page 876:

"It is conceded by Mr. Dunlop, and is, I think, quite clear law, that *the mere fact that a contract is illegal by the law of a foreign State to which one of the contracting parties is a subject will not*

make that contract illegal or unenforceable if it is an English contract to be construed according to English law and to be enforced according to the law of this country. Therefore, if it were not for the exception of restraint of princes, the Swedish owners in this case could not rely upon the fact that this charterparty is illegal according to Swedish law. But the charterparty contains the exception of restraint of princes."

A case growing out of conditions due to the recent war is that of *Aktieselskabet Frank v. Namqua Copper Co., Ltd.*, 36 T. L. R., 438 (not yet reported in official series). There discharge of a vessel at a port in Cape Colony was delayed because all the discharging facilities had been taken over by the Government for military purposes. The Court (King's Bench Div.) held the shipowner entitled to demurrage, saying (36 T. L. R., at 441):

"The port of discharge was so situated that it was not improbable that the Imperial or Colonial Government might require to exercise for military ends the control which they in fact did exercise over the port and which they had begun to exercise before the date of the charter-party. If it had been intended that the risk of delay arising from such control should be put on the shipowners and that the cargo owners should be relieved from demurrage so caused, it is not unreasonable to suppose that specific words would have been used that would leave no doubt as to the intention of the parties."

So here, the possibility of requisition must have been contemplated; if it was intended to shift to the charterers the consequences of the owners' failure to perform because of requisition, why did not the parties so state?

In short, the law has long been settled to the effect that, where there is an absolute obligation, difficulty or even impossibility of performance is no defense, except in cases of personal disability preventing performance of a contract for personal service, destruction of the subject-matter upon the continued existence of which the contract depends, and prohibition by domestic law.

There is no question here of the first or the third of these alternatives. The District Court sought to bring the case within the second, and in its opinion (pp. 236-237, fols. 708-709) argued that "for the purposes of this suit, the *Ogilvy* was or became non-existent."

This suggestion is more fully discussed below (pp. 38-40). It will suffice at this point to say that the ship did not *cease to exist*, any more than if she had been delayed by stranding or by collision, or by any other obstacle. She was merely subjected to a restraint (assuming that the requisition was valid) of a kind not excepted in the charter and not permanent in its nature. Such a situation cannot possibly be treated as an instance of destruction of the subject-matter of the contract. It is simply a case where performance has been rendered impossible for the moment by foreign law.

2. *Prevention by foreign law not a defense.*

It seems hardly necessary to go into an extended discussion of the principle which has been settled so long and so definitely, that prevention of performance by foreign law is no excuse. This contract was an American contract, made in New York, and deriving its obligation from the law of

the State of New York. This Court is an American court, asked to enforce the contract. The performance of the contract was to begin in this country. The defense is that the law of another country, to wit, Great Britain, has interposed an obstacle. It makes no difference whether that law is a municipal regulation, an act of Parliament, an Order in Council or a so-called prerogative of the Crown. It is immaterial whether the law is British or French or Russian. The case presents merely another instance of prevention by foreign law of the performance of an American contract—the same situation which has been so often and so uniformly dealt with by the courts both of this country and of England. The law is that if a foreign government says to one of the parties to a domestic contract: "We will not let you perform your obligation," the domestic court will say, "We do not recognize that a foreign power may destroy the obligation of our contracts and deprive our citizen of the benefit of his bargain. The contract must be performed or damages must be paid."

If it be suggested that the fact that the cargo was to be discharged in British South Africa affects the question, the answer is found in the words of Mr. Justice Willes, in *Lloyd v. Guibert*, 6 Best & S., 100, where a contract of carriage required discharge at Liverpool. The Court held that the law of England as the place of discharge did not govern the case because it was "manifest that what was to be done at Liverpool was but a small portion of the entire service to be rendered, and that the character of the contract cannot be determined thereby." This passage is quoted and relied upon

by this Court in *Liverpool v. Great Western Co.* (the *Montana*), 129 U. S., 397.

See too *China Mutual Ins. Co. v. Force*, 142 N. Y., 90.

The text writers are unanimous in laying down the rule that prevention by foreign law is no excuse. The following quotations from standard works will suffice:

8 *Elliott on Contracts*, par. 1891:

"Impossibility of performing a contract caused by a foreign law is no excuse for non-performance."

2 *Parsons, Contracts*, 9th ed., p. 828:

"It would seem that a prevention by the law of a foreign country is no excuse, because this does not make the act unlawful in the view of the law which determines the obligation of the contract."

Leake, Contracts, 6th ed., p. 510:

"An impossibility caused by foreign law or by the act of a foreign state does not discharge a contract in this country."

To the same effect:

Wald's Pollock on Contracts, 3rd ed., p. 530.

Williston, Sales, Sec. 661.

Scrutton on Charter-parties, 9th ed., p. 11:

"If performance of the contract is rendered impossible by foreign law, a party cannot plead impossibility or illegality as a defense to a claim for breach of contract."

In the recent case of *Richards & Co. v. Wreschner*, 174 N. Y. App. Div., 484, at 488 (referred to at p. 24, *supra*), it is said:

"It is well settled that impossibility due to foreign law is no excuse."

The adjudicated cases to the same effect are many.

In *Kirk v. Gibbs*, 1 H. & N., 810, a charter-party provided that the vessel was to proceed to a Peruvian port, and there get a required pass and load a cargo of guano. Owing to the law of Peru, the defendant could not get the pass except for a part cargo. It was held that this was no excuse. The Court said:

"The obligation was on the defendant to get the pass."

In *Barker v. Hodgson*, 3 M. & S., 267, the charterer was to furnish a cargo at a certain Spanish port, but was prevented from doing so because all intercourse with the port was forbidden owing to an epidemic. Impossibility of performance by reason of this law was pleaded, but the Court said:

"If, indeed, the performance of the covenant had been rendered unlawful by the Government of this country, the contract would have been dissolved on both sides, and the defendant, inasmuch as he had been thus compelled to abandon the contract, would have been excused for the non-performance of it, and not liable for damages. But if in consequence of events which happened at a foreign port, the freighter is prevented from furnishing or loading that which he has contracted to furnish, the contract is neither dissolved nor is he excused for not performing it, but must answer in damages."

Barker v. Hodgson was cited with approval by this Court in *Gates v. Goodloe*, 101 U. S., at 620.

In *Benson v. Trundy*, 13 Md., 20, a charterer was held liable for failing to furnish a cargo of guano from Peru in spite of the fact that its export was forbidden by the Peruvian Government. The Court followed the English rule as laid down in *Barker v. Hodgson*, 3 Maule & S., 267, basing the liability on the fact that the contract "contains no saving clause to meet the contingency" (p. 52).

And in *Clifford v. Watts*, L. R. 5 C. P., 577, 586, the Court commented on *Barker v. Hodgson*, saying, per Willes, J.:

"If the intercourse with the foreign port had been prohibited by the law of this country, the act would have been illegal, and the defendant would have been excused, not because he could not, but because he ought not to do it. But, where the performance of the thing covenanted to be done is not made impossible by the law of this country, the case falls within the principle laid down in the leading case of *Paradine v. Jane*, where the defendant, in an action for rent, sought to excuse himself by reason of his having been expelled from the premises by alien enemies, and his plea was held insufficient."

In *Hare v. Whitmore*, 2 Cowp., 784, it was held that a foreign embargo would not excuse a breach of a warranty to sail by a certain date. In *Atkinson v. Ritchie*, 10 East, 530, it was held that a foreign embargo was not a defense to a suit for breach of a contract to load.

In *Blight v. Page*, 3 Bos. & P., 295, where the defendant had agreed to load a full cargo of barley at Libau, Russia, it was held no defense to an ac-

tion for freight that the Russian Government forbade the export of barley. To the same effect is *Sjoerds v. Luscombe*, 16 East, 201, where the Court said :

"if the freighter undertake what he cannot perform, he shall answer for it to the person with whom he undertakes."

In *Jacobs v. Credit Lyonnais*, L. R. 12 Q. B. D., 589, 20,000 tons of Algerian esparto were to be shipped by a French company. There was an insurrection in Algeria and the transport of esparto was forbidden. This would have been a defense under French law; but the Court held a plea setting forth these facts to be bad on demurrer. This decision has recently been approved as representing the law of England to-day (*Blackburn Bobbin Co. v. Allen*, 1918, 1 K. B., 540, at 551).

An interesting recent case on the subject of foreign law as affecting a domestic contract is that of *Trinidad Shipping Company v. Alston & Co.*, 1920 App. Cas., 888. There, by virtue of a contract made in British territory, a shipper was entitled to collect from a carrier a deferred rebate on the freight of goods shipped from Trinidad to New York. Payment of such rebates was illegal under the Act of Congress of September 7, 1916, passed, apparently, subsequent to the date of the contract. The Privy Council held that the Act of Congress did not relieve the carrier of the obligation to make the payment. The ground of the decision was that the obligation of a British contract could not be cut off by a law of the United States. This is precisely the proposition which the charterer advances in the case at bar.

This decision may be contrasted with the decision of the Court of Appeal in *Ralli Bros. v. Compania Naviera* (1920), 2 K. B., 287, where it was held that a contract requiring one Spaniard to make to another Spaniard in Spain a payment illegal under Spanish law is not enforceable. The distinction between this case and the *Trinidad Shipping Co.* case is, of course, that in the former, but not in the latter, the act contracted for was illegal by the law of the place of performance and both parties owed allegiance to that law. Obviously in this respect the case at bar resembles the *Trinidad* case. The present charter is not governed by the law of England and was not to be performed in English territory. The fact that the cargo was to be discharged in a British possession does not make the contract subject to British law (see *Lloyd v. Guibert*, 6 Best & S., 100, referred to and quoted p. 30, *supra*; also *The Montana*, 129 U. S., 397, p. 31, *supra*).

The American cases, some of which have already been referred to, are even more strict than the English.

In *Duff v. Lawrence*, 3 Johnson's Cas., 162, where loading was prevented by war, Kent, J., said, page 172:

"If, therefore, the prohibition in question had arisen from our own Government either before or after the commencement of the voyage, it would have dissolved the contract. But as it arose from the government of another country, it does not dissolve, nor absolutely excuse the performance of the contract, because the laws of one nation do not give effect to the positive institutions of another inconsistent with its own."

In *Holyoke v. Depew*, 2 Ben., 334, Fed. Cas. No. 6652, a vessel was chartered for a voyage to the

Canary Islands and return, the charter containing no restraints of princes clause. The authorities at the Canaries would not permit the vessel to load unless she would first go to Spain for quarantine, which the master refused to do. *Held* (Blatchford, J.) that the owner was liable, because, there being no restraints clause, he had made an absolute engagement to take the cargo and could not plead the act of the authorities as an excuse. The Court said :

"In the absence of any clause exempting the vessel from liability because of the restraints of rulers and princes, I think the fault was hers in not being in a condition to receive the barilla, and that her owners and not the charterer must bear the loss. *Ogden v. Graham*, 31 L. T. Q. B. pt. 2, p. 29; *Spence v. Chodwick*, 10 Q. B. 528; *Brooks v. Minturn*, 1 Cal. 484."

In *Beebe v. Johnson*, 19 Wend., 500, the defendant sold to the plaintiff certain patent rights, agreeing to perfect them in England so as to secure to the plaintiff the exclusive rights in Canada. This could not be done because by the British law such exclusive rights could be granted only to British subjects. It was held, however, that this foreign law was no defense. This decision was cited with approval by this Court in *The Harriman*, 9 Wall., 161.

See, too, *Ye Seng Co. v. Corbitt*, 9 Fed., 423-430, where a shipowner had entered into a contract to carry coolies from China to the United States and it was held no defense that the Chinese authorities refused to permit the vessel to carry passengers.

In *Tweedie Trading Co. v. MacDonald*, 114 Fed., 985, the contract was to carry laborers from Bar-

badoes to Colon on four separate trips. After two trips had been made the Government of Barbadoes forbade the further carriage of laborers. It was held that this was no excuse in a suit for the charter money. The Court said (p. 988):

"Prevention by the law of a foreign country is not usually deemed an excuse when the act which was contemplated by the contract was valid in view of the law of the place where it was made and *a fortiori* when it was also then valid at the place of performance."

The cases of *Spence v. Chodwick and Richards & Co. v. Wreschner* have already been referred to (pp. 20, 27, *supra*). The latter is cited with approval by the Circuit Court of Appeals for the Ninth Circuit in *Swayne v. Everett*, 255 Fed., 71, at page 74, where the Court says:

"At the time of the occurrences in question, England and Germany were at war, but the United States was not; on the contrary, this country was then observing strict neutrality between those belligerents. How, then, can it be properly held that the performance of the clear legal duty of an American carrier to receive and transport goods tendered for carriage by an American citizen is excused on the ground that the British government had forbidden its citizens and corporations, one of which happened to be the agent of the American carrier, from receiving the tendered freight and providing for its transportation? Such is not the law as we understand it. See *Richards & Co., Inc. v. Wreschner*, 174 App. Div., 484, and the numerous cases there cited."

So here the right of an American citizen to have his contract performed is not destroyed by the fact that a foreign government has instructed the other party to the contract not to carry it out. The own-

ers did not guard themselves against that contingency and the loss should fall on them.

A striking example of the rule is supplied by the oft-cited case of *Taylor v. Taintor*, 16 Wall., 366, where a man was indicted in Connecticut, was released on bail, and, while on bail, was convicted on another charge and imprisoned by the authorities of the State of Maine. It was held no defense to his bondsman in Connecticut that they were prevented from producing him by the action of the Maine authorities in putting him in prison. The rule was concisely stated in the majority opinion as follows (p. 371) :

"The law which renders the performance impossible, and therefore excuses failure, must be a law operative in the state where the obligation was assumed, and obligatory in its effect upon her authorities."

The foregoing authorities indicate what has always been considered clear law—that, in the absence of an exception in the contract, the interference of a foreign government preventing the performance of the contract is not a legal excuse. This is well settled both in England and in this country.

As already pointed out, the District Court sought to bring the present case within the authorities by calling it a case where the vessel had become non-existent. This is a mere figure of speech. It might equally well be said that, whenever the act of a foreign government prevents the loading of a cargo, that cargo is non-existent, and yet in case after case it has been held that liability exists under such circumstances. Indeed, any case of impossibility might be stated in the same sort of figurative

language. Whenever a thing cannot be done, or carried, or secured, that thing is, for the purposes of that contract, non-existent. It cannot be put to the expected use. I agree to deliver a certain ship to a purchaser. If the ship is burned up, I am ordinarily excused. But if the ship exists, and I cannot deliver because I cannot get her, then I have broken my contract. It will not do for me to say, "I cannot get this ship to deliver to you; therefore the ship is, for our purposes, non-existent, and therefore our contract is at an end." Any case of impossibility, almost any case of breach, might be set forth in similar terms. Such a figurative phrase does not conduce to clear thinking and does not advance the solution of the problem. Where there is truly destruction of the subject-matter, a peculiar situation is created, with which the law usually deals by declaring, as the fairest solution, that the contract is annulled. But where, the subject-matter being intact, an obstacle arises to performance by one party, the question is: Is the nature of the obstacle such that, under the law or according to the provisions of the contract, the default is excused? The law both of this country and of England is that prevention by foreign law does not excuse. Unless, therefore, well-settled law be overruled or unless an exception to the ordinary rule be created, the shipowners in the present case are not absolved from liability by the act of the British Government.

It seems unnecessary to refer more particularly to the extract from the Defense of the Realm Act, pleaded in the answers, folios 32-33, and printed in the record at pages 206-207. It declares that, where performance of a contract is interfered with

by any requirement of the Admiralty, etc., that fact shall constitute a defense. Of course the statute has no effect on an American contract in suit before an American court. The same observations apply to the Courts (Emergency Powers) Act, printed at pages 208-213.

To summarize the argument thus far—even if it be assumed that there was a valid requisition and that the vessel was operated under it, still the ship-owners are clearly liable under the authorities, because they assumed by their contract an absolute liability; they did not guard against the very probable contingency of requisition; and the only defense suggested—namely, prevention by the act of a foreign government—is not, according to well-settled principles, a defense at all.

SECOND.

There was no frustration of the charter.

The contention of the owners will doubtless be that, admitting that foreign law is not a defense ordinarily, still the principle of frustration applies, and that such frustration may result from the act of a foreign government or from foreign law. It will be noted that the cause said to have brought about the frustration in the present case was one which must have been within the contemplation of the parties, and yet one which they did not except in framing their contract.

The general principle is unquestionably as stated in the last point—namely, that an absolute obligation must be performed unless performance is pre-

vented by destruction of the subject-matter, by domestic law, or by the act of the other party. If the doctrine of frustration is applied to cases where performance is prevented by foreign law, then either the general rule must be overturned (which is inconceivable) or else such cases must be treated as exceptional, and a new rule of law must be established to cover them.

The doctrine of frustration appears to be an effort to correct what, in some cases, has been regarded as the injustice of enforcing a contract under circumstances fundamentally different from those which the parties foresaw or could reasonably have been expected to foresee. Manifestly, it is to be applied with great caution. The Courts have usually sought to express the doctrine as one of "implied condition" in the contract; or as an attempt to effectuate what the Court believes to be the intent of the parties—*i. e.*, to write the contract as the Court thinks that the parties would have written it, if they had framed a provision designed expressly to cover the contingency which actually arose. In spite of these attempts, by the use of conventional phraseology, to bring the doctrine of frustration within the general powers of the Court and to make it appear that the Court is merely construing and enforcing a contract already made by the parties, the plain fact is that the Court is making for the parties a new contract; or, perhaps more accurately, declining to enforce, for equitable reasons, the contract which the parties themselves have made.

The general rule is that absolute obligations must be enforced. To relax this rule unduly is, obviously, to extinguish the obligation of contracts.

Only in a case of the plainest need should such a remedy be applied, and it should never be applied to a case where the parties must have had the contingency in contemplation and simply failed to provide for it. Under those circumstances, it is submitted, no Court can annul this or any other contract.

The so-called doctrine of frustration is really new in name rather than in nature. Nearly all the cases are simply instances of the well recognized types of impossibility already discussed (prevention by domestic law, destruction of subject-matter, etc.), expressed in the phraseology of frustration, or cases falling within the excepted causes. *The Allanwilde*, 248 U. S., 377 (further discussed *infra*, p. 43), for example, a case on which the owners rely here, is nothing but a case of prevention of performance by domestic law expressed in terms of frustration. The same is true of every one of the English requisition cases. None of the American cases and few of the English, have ever held a contract frustrated by a cause not excepted by the parties, and not falling within the categories already discussed. Nor is frustration applied to cases where the obstacle was readily foreseeable. And finally, no Court anywhere has ever held a contract frustrated unless the obstacle clearly appeared to be such as necessarily to postpone the performance of the contract beyond the time when it would be fair or reasonable to require the parties to perform it.

With these thoughts in mind, a brief review of the leading American and English cases may be of value.

American Cases.

The owners apparently rely on *Allanvilde Transport Corporation v. Vacuum Oil Co.*, 248 U. S., 377. There oil had been shipped by schooner from New York for France during the war. The vessel, after sailing, was obliged by heavy weather to put back and thereafter was prevented from resuming her voyage by an embargo laid by the United States Government. The suit was brought to recover back prepaid freight. It was held that, under the contract of carriage, the freight was not recoverable and, further, that the contract was frustrated.

This is obviously a case where performance was prevented by domestic law and, according to well-settled rules already discussed, the obligation of the contract was at an end. It should be noted that the delay was evidently going to be of indefinite and prolonged duration, and that this Court considered that the decisive factor. This Court said (p. 386) :

"The duration was of indefinite extent. Necessarily the embargo would be continued as long as the cause of its imposition—that is the submarine menace—and that as far as then could be inferred would be the duration of the war of which there could be no estimate or reliable speculation. The condition was therefore so far permanent as naturally and justifiably to determine business judgment and action depending upon it."

This is in line with other decisions referred to below, to the effect that a delay which by its very nature will last as long as an existing war, is such a delay as to bring about frustration, provided that the other necessary elements are present.

In *North German Lloyd v. Guaranty Trust Company*, 244 U. S., 12, no question of frustration arose. It was held there that the master of a German steamship had not been guilty of a breach of contract, when he abandoned his voyage and sought a neutral port upon the eve of the war and in the face of reasonable apprehension of capture. It will be noted that in this case the outbreak of the war could not reasonably have been apprehended at the time when the contract was made. The contract also contained the exception of restraints of princes.

In *Columbus Railway Co. v. City of Columbus*, 249 U. S., 399 (already referred to, p. 24, *supra*), a street car company which was under contract to furnish service at a fixed rate, sought to have its contract terminated because the War Labor Board had raised the wages of its employees so as to render the rates inadequate. This Court declined to hold the contract terminated, saying (p. 412):

"Unforeseen difficulties will not excuse performance. Where the parties have made no provision for a dispensation the terms of the contract must prevail."

In *Earn Line v. Sutherland SS. Co., Ltd.*, 264 Fed., 276, the steamship *Claveresk* was under time charter. The charter excepted restraints of princes. It had been made in 1913, prior to the war, at a time when the war conditions could not have been foreseen. The vessel was requisitioned by the British Government. The Circuit Court of Appeals for the Second Circuit held that the contract was at an end, basing its decision upon the finding of fact that—

"in January-February, 1917, having regard to the then violence of German submarine warfare on merchant vessels, and the success thereof, no reasonable man would have expected or even dared hope that the *Claveresk*, once taken into Government service, would be released for any use contemplated by the charter of 1913, before the expiry of the term of that charter."

It will be noted that in this case (1) the cause was excepted; (2) the actual conditions could not reasonably have been foreseen when the contract was made; (3) the detention of the ship was proved to be such as to make it impossible to resume performance of the charter until after the expiration of the whole charter period. The Court did not hold, nor, it is submitted, can any court reasonably hold, that *the mere fact of requisition*, without more, extinguishes a charter. Under even the most liberal view of the frustration doctrine, it must be proved that performance has become so clearly and hopelessly remote as to warrant the court in putting into the contract a new condition and calling it frustrated.

This case goes further, it is believed, than any case in our courts. In the *Isle of Mull*, 257 Fed., 798, practically the same question was decided the other way by Judge Rose in the District of Maryland. He held that the charter was not frustrated and required the owner to account to the charterer for the vessel's earnings.

In *Lewis v. Mowinkel*, 215 Fed., 710, the vessel was under a time charter for a period of one year, which had not yet begun. The vessel stranded under circumstances such that there was imminent

danger that she would become a total loss. She was finally floated and repairs were completed after the expiration of more than a year—at a time when performance of the charter in question would, in the ordinary course, have been finished. The charter-party contained an exception of perils of the sea. It was held that the owners of the ship were under no obligation to enter upon the performance of the charter when the repairs had been completed. The Circuit Court of Appeals for the Second Circuit said:

“The delay was caused by a peril of the sea excepted in both charters, and the owner was therefore relieved. Certainly it was not contemplated by the parties that they were entering into a charter which could be interpreted to begin a year after the expiration of the Munson charter. We agree with the District Court in thinking that the stranding of the steamer, in such circumstances as to induce her owners to believe that she would become a total loss and in any event to make her employment impossible for many months, released them from liability under the charter. It excused both parties, but did not make a new contract.”

Here again the cause of the delay was one excepted by the contract and the delay was so long as to make performance of the contract thereafter unreasonable.

English Cases.

The same fundamental requisite of “inordinate” postponement or unreasonably delayed performance is emphasized throughout the English cases.

In the case of *Admiral Shipping Co. v. Weidner & Co.*, 1916, 1 K. B., 429, at 436, 437, Mr. Justice

Bailhache gave the following definition of frustration, which has since received judicial approval in other courts:

"The commercial frustration of an adventure by delay means, as I understand it, the happening of some unforeseen delay without the fault of either party to a contract, of such a character as that by it the fulfilment of the contract in the only way in which fulfilment is contemplated and practicable is so *inordinately postponed* that its fulfilment when the delay is over will not accomplish the only object or objects which both parties to the contract must have known that each of them had in view at the time they made the contract, and for the accomplishment of which object or objects the contract was made."

Apply this to the case at bar: (1) The charterers' purpose was to get oil carried; the owners' was to earn freight. Neither of these objects would be frustrated by delay. (2) The delay was certainly not "unforeseen." All the world knew, when this charter was signed, that requisitions were common enough. (3) There is no evidence that the fulfilment would have been "inordinately" postponed, or that any postponement would in the slightest degree have affected the objects which the parties had in view. The case does not in the least fall within the definition.

The fundamental test under this definition is the effect on the contract of the probable delay involved. That is the question chiefly considered in all the frustration cases. A contract is never held to be dissolved unless the delay is plainly going to be so long as to make the contract a different contract and to defeat the objects of the parties. Thus, in the leading case of *Jackson v. Union Marine Ins. Co.*, L. R. 8 C. P. 572; L. R. 10 C. P.,

125, a vessel en route to her loading port stranded on January 3rd was floated on January 4th, very badly damaged, and was still under repair at the time of the trial in August. The jury found that the delay had been so long as to make it unreasonable to require the charterer to furnish a cargo after repairs were finished, and on this finding the Court held that the shipowner could not enforce the charter. In the Exchequer Chamber, the ground of decision is stated as follows by Bramwell, B.:

"I understand that the jury have found that the voyage the parties contemplated had become impossible; that a voyage undertaken after the ship was sufficiently repaired would have been a different voyage; not, indeed, different as to the ports of loading and discharge, but different as a different adventure—a voyage for which at the time of the charter the plaintiff had not in intention engaged the ship nor the charterers the cargo; a voyage as different as though it had been described as intended to be a spring voyage, while the one after the repair would be an autumn voyage."

As was said by Viscount Haldane in *Bank Line v. Capel & Co.*, 1919, App. Cas., 435; 14 Asp. M. Cas., 370:

"Whether frustration has taken place is always a question which depends on the circumstances to which the principle is to be applied, rather than upon abstract considerations."

The question must, therefore, be decided on the facts of each case; but frustration is not lightly to be found. Lord Sumner in the *Bank Line* case, *supra*, puts it accurately in saying that:

"When the causes of frustration have operated so long or under such circumstances as to raise a

presumption of *inordinate delay*, the time has arrived at which the fate of the contract falls to be decided."

In other words, requisition alone is not enough. Either the frustrating causes must operate for a long time or the circumstances must be such as to make it plain that they will so operate as to produce "inordinate delay." There are no facts in this case on which such a finding could be based.

In the leading case of *F. A. Tamplin SS. Co. v. Anglo-Mexican Co.*, 1916, 2 App. Cas., 397, the question was whether a time charter which contained a restraints of princes clause was abrogated by requisition of the vessel. Even though the contract was made before the war, when requisition could not have been within the contemplation of the parties, it was held by a majority of the Law Lords that the interruption was not shown to be of such a nature and duration as to end the contract. Both the majority and the dissenting opinions emphasized as the important question whether the interruption was of such a character as to render further performance unreasonable. Thus Earl Loreburn said (p. 403):

"In applying this rule it is manifest that such a term can rarely be implied except when the discontinuance is such as to upset altogether the purpose of the contract."

At page 405:

"On the other hand, if the interruption can be pronounced, in the language of Lord Blackburn already cited, 'so great and long as to make it unreasonable to require the parties to go on with the adventure,' then it would be different. * * * Taking into account, however, all that has happened, I can-

not infer that the interruption either has been or will be in this case such as makes it unreasonable to require the parties to go on."

And so Viscount Haldane, one of the dissenting Judges, said (p. 407) :

"But if the facts be such that it appears that the power of performance has been wholly swept away to such an extent that there is no longer in view a definite prospect of this power being restored, then the contract must be looked upon as wholly dissolved."

Where it has been clear that the delay must of necessity last for *the entire period of a war*, the contract has been generally held frustrated. In *Geipel v. Smith*, L. R. 7 Q. B., 404, Lush, J., said :

"A state of war must be presumed to be likely to continue so long, and so to disturb the commerce of merchants, as to defeat and destroy the object of a commercial venture like this."

To the same effect, *The Allanwilde*, *supra*, p. 43.

So where a British vessel was in a Baltic port at the outbreak of the recent war, it was said (per Swinfen Eady, L. J.) that "the enforced delay by reason of the war is of such long and indefinite duration as completely to frustrate the adventure in a mercantile sense." (*Admiral Shipping Co. v. Weidner & Co.*, 1917, 1 K. B., 222; 13 Asp. M. C., 539; *Scottish Navigation Co. v. W. A. Souter & Co.*, 1917, 1 K. B., 222; 13 Asp. M. C., 539.) There the delay had already lasted for some three months before the matter of frustration was brought up. So in *Countess of Warwick SS. Co. v. Le Nickel Societe Anonyme* and *Anglo-Northern Trading Co. v. Emlyn, Jones & Williams*, 1918, 1 K. B., 372;

14 Asp. M. Cas., 242, where frustration was found, it was proved by the testimony of shipping experts that there was no hope of the vessel's release until the war was ended.

In *Bank Line v. Capel & Co.*, 1919 App. Cas., 435, the charter was for twelve months. The vessel was requisitioned at about the time when she would have entered upon performance. It was held by a divided Court that the charter was terminated because detention had already lasted so long (about four months) as to make performance at its termination performance of a different contract. Lord Wrenbury expressed the opinion (p. 461) that the contract would continue for a reasonable time—say, two months—but that four months was more than a reasonable time.

In considering the present case, it must be remembered that it came up early in the war. At that time there was not the terrible scarcity of tonnage that occurred two years later. In this case there was no reason to expect detention for the duration of the war. In fact, the vessel was released at the end of October, 1915, as soon as she had finished the four voyages for which her owner had committed her. In various other cases—*c. g.*, *Modern Transp. Co. v. Duncric SS. Co.*, 1917, 1 K. B., 370—vessels were released after short periods of service. Other instances appear in the case of *Chinese Mining Co. v. Sale*, L. R. 1917, 2 K. B., 599; 22 Com. Cas., 352. There the steamer *Albiana* was requisitioned in July, 1915, released in September, and not again requisitioned until December, 1916. The *Wimbledon* was requisitioned in August, 1914, released in December, 1914, and again taken in January, 1916. These instances show that the release

of the *Baron Ogilvy* after two months' service was quite possible. That would have been on June 10th, less than a month after the cancelling date.

The next two cases referred to are of particular importance as showing anew that frustration cannot be found unless the interruption be of such duration as to prevent performance for an unreasonable or "inordinate" time.

In *Miller & Co. v. Taylor & Co.*, 32 T. L. R., 161; L. R., 1916, 1 K. B., 402, the contract was for the purchase of confectionery for export, delivery to be in August and September, 1914. War began on August 4, 1914. On August 10, the Government forbade the export of sugar; on August 14, the plaintiffs (vendors) cancelled the contract. On August 20, the embargo on sugar was lifted. The plaintiffs claimed that the contract was destroyed by the embargo; but the Court of Appeal unanimously held the contrary, saying:

"In the present case, if the interruption had been such that the contracts could not be carried out within a reasonable time, that would have sufficed to invalidate the contracts. If, on the other hand, the interruption was not such as to have that effect, there was not such an interruption as would annul the contracts. The contracts here were to manufacture goods in a reasonable time. No time was specified in the contracts, and the usual course of business between the parties was that goods should be delivered within six or eight weeks. The duty of the plaintiffs after the Proclamations of August 5 and 10 was to wait a reasonable time to see if they could carry out the contracts, and if they had done this the result would have been that the contracts would have been duly carried out. The suspension of the power to export confection-

ery was for a very short period, and would not have prevented the contracts from being carried out in the manner contemplated by the parties."

In *Austin Baldwin & Co. v. Turner & Co., Ltd.*, 36 Times L. R., 769, K. B. Div., 1920 (not yet reported in official series), the contract was for the sale by an American firm to a British buyer of a quantity of saccharin, to be delivered monthly during 1919. The contract was made about October 1, 1918. There was some indication in the correspondence that the buyer was to take the responsibility of procuring from the British authorities an import license. In October, 1918, the buyer applied for such a license and was refused. On December 5, the buyer wrote to the seller cancelling the contract. On December 20, the restrictions on the importation of saccharin were removed. The buyer claimed frustration. The Court said:

"Does the refusal of a permit amount to frustration? I do not think it necessary to deal in detail with the decisions. *All are based on this principle: either that there is an implied term that a certain state of things shall continue to exist, or that there is an express or implied term that in a certain event the contract may be rescinded.* Here the certain event is said to have been the non-granting of a license. In my opinion it was not an implied term that the contract should be rescinded if a license was not granted. The defendants expressly and as part of the contract took the risk of obtaining a permit, and it does not lie in their mouths to say that the contract was frustrated because they could not do so. Without going into the cases in detail I come to that conclusion on the general principle underlying them. Even if it could have been made out that in November or October there was a frustration of some venture it was not of *this* venture,

which was not a contract for the export of saccharin in October and November, and it appears that by December 20 all restrictions had been removed, and by January 1 there was absolute freedom and no restriction on the carrying out of this contract. *I think it was the defendants' duty to wait a reasonable time to see if permission could have been granted later.* I find as a fact that December 20 would have been a reasonable time."

While it is true that, in the case last cited, the buyer had taken the risk of failure to procure a permit, still the opinion emphasizes the principle underlying frustration cases, namely, that the delay must be a destructive delay and that it is necessary "to wait a reasonable time to see if permission could have been granted later," unless, at least, the very nature of the detaining cause is such as to make destructive delay a certainty.

In *Lloyd Royal Belge v. Stathatos*, 33 Times L. R., 390, a Greek vessel, under charter for a voyage from Gibraltar to the United States and return to a French port, was detained "by the authorities at Gibraltar by reason of a general decision arrived at by the British Government to detain Greek ships in consequence of the situation that had arisen between the Allies and the Greek Government." It was held by the Trial Court that this was a detention "for reasons of State, which would not be fully known to the parties, and for a period the duration of which must be uncertain and might be prolonged," and amounted to a frustration. The Court referred to the fact that the boat was, to the knowledge of both parties, intended to fulfill a definite voyage on a regular schedule (pp. 390, 391). The Court of Appeal affirmed (34 Times L. R., 70), apparently with some hesitation, saying that the case was a close one. The charter was sub-

ject to restraints of princes and the obstacle was the act of the domestic government.

The following cases indicate that even prolonged detention or absolute change of circumstance does not of necessity bring about frustration.

In *Blackburn Bobbin Co. v. Allen Co.*, 1918, 1 K. B., 540, a contract was made before the war for sale of a quantity of Finland timber. The outbreak of war made the importation of such timber impossible. The sellers claimed that the contract had been dissolved by the outbreak of the war. The opinion of the Court (McCardie, J.) discusses the doctrine of impossibility of performance at great length and holds that the contract in suit was not extinguished by the outbreak of the war. His decision was affirmed by the Court of Appeal (1918, 2 K. B., 467).

In *Hudson v. Hill*, 2 Asp. M. C., 278; 43 L. J. C. P., 273, there was a voyage charter under which lay days were to begin on April 1st. Owing to bad weather and other difficulties, the vessel did not reach the loading port until July 28th. Held, no frustration—charterer must load.

To the same effect is *Jones v. Holm*, 2 Ex., 335, where a vessel, after arrival at the loading port in March, took fire and was not repaired until July 30th. It was held that the charterer was bound to load and that the charter was not ended.

So in *The Progreso*, 50 Fed., 835, it was held that a delay of a month, due to quarantine, did not terminate the charter. The charter was a voyage charter and the charterer had an option to cancel

if the vessel did not arrive on or before October 1st. There was a restraints clause. The authorities at the loading port imposed a quarantine which extended for a month beyond the cancelling date. It was held that the charter was not thereby terminated and that the shipowner was liable for refusing to perform.

And see :

The Star of Hope, 1 Hask., 36; Fed. Cas., 13312 (where delay in reaching loading port, due to heavy weather, held not to terminate contract).

Hadley v. Clarke, 8 Term R., 259 (prolonged embargo held not to dissolve contract of carriage).

The Patria, L. R. 3 Adm. & Ecc. (where even a blockade of the port of destination was held not to terminate a charter).

Hurst v. Usborne, 25 L. J. C. P., 209; 18 C. B., 144 (delay of several months in reaching loading port did not frustrate).

Assicurazioni Generali & Co. v. Bessie Morris SS. Co., 7 Asp. M. C., 217; 1892, 2 Q. B., 652 (where stranding, partial submergence of the vessel and delay of nearly two months for repairs did not frustrate).

Clark v. Mass. Fire & Marine Ins. Co., 2 Pick., 104 (where delay of two months for repair, causing the charterer to lose the object of the voyage, did not frustrate).

In 3 Kent Com., 14 Ed., Sec. 249, it is said :

"But a temporary impediment of the voyage does not work a dissolution of the charterparty; and an embargo has been held to be such a temporary restraint, even though it be indefinite as to time. The same construction is given to the legal operation of a hostile blockade, or investment of the port of departure, upon the contract. It merely suspends the performance of it, and the voyage must be broken up or the completion of it become unlawful, before the contract will be dissolved. If the cargo be not of a perishable nature, and can endure the delay, then the general principle applies that nothing but occurrences which prevent absolutely the execution of the contract will discharge it. The parties must wait until those which merely retard its execution are removed."

The greater part of the English cases where the defense has been upheld fall plainly within the recognized categories of prevention by domestic law, destruction of subject-matter, etc. Manifestly all the requisition cases are cases where performance was prevented by domestic law, and nearly all of the other cases cited on behalf of the owners come within the same classification. Thus in *Ship-ton, Anderson & Co. v. Harrison Brothers*, 21 Com. Cas., 138, the contract was for sale of a specified lot of wheat, which was thereafter requisitioned by the British Government. Since the use of wheat necessarily destroys it, such requisition was, of course, merely a case of destruction of the subject-matter.

So in *Nickoll v. Ashton & Company*, 1901, 2 K. B. D., 126, a contract for shipment by a specified steamer at a definitely fixed time was held to be a case of destruction of the subject-matter, where the vessel in question was stranded and so

seriously damaged that she could not be repaired in time to carry the cargo at the time fixed.

So in *Taylor v. Caldwell*, 3 B. & S., 826, where the lease of a music hall was held terminated by the destruction of the building by fire, the case obviously falls within the recognized categories.

In *Metropolitan Water Board v. Dick Kerr & Co.*, 1918, App. Cas., 128, where there was a contract for the construction of a reservoir and the British Ministry of Munitions ordered the work stopped and the material sold to munition factories, the case was clearly one of prevention of performance by domestic law.

In no case has the defense of frustration been upheld where the situation has been what it is here: (1) American contract, in suit in an American court, sought to be terminated by foreign law; (2) charter made in contemplation of an existing war and at a time when requisitions were matters of daily occurrence; (3) no restraints clause; (4) a charter which required the ship to tender even if she were behind her cancelling date; (5) requisition occurring five weeks before the cancelling date, with some intimation that it would continue for a few weeks only; (6) no evidence that the requisition would be prolonged; (7) voluntary fixture by the owners for a six or seven months' service; (8) total repudiation of the charter *at once*.

In order to succeed under the facts of this case, the owners must establish that the *mere fact* of requisition, *ipso facto* and without more, as matter of law, terminated the charter. Without an exception, without proof of the probable length of the requisition, without any facts in the record from which the Court can reach a conclusion about

its probable length, there is nothing here but the mere fact that the vessel *was requisitioned*. No case has ever held that this alone is enough to accomplish frustration; numerous cases have held the contrary.

That the mere fact of requisition is not enough is shown (if proof be needed) by the cases in which charters have been held to survive requisition—*e. g.*, *Tamplin Co. v. Anglo-Mexican Co.*, 2 App. Cas., 397; *Modern Transp. Co. v. Duneric SS. Co.*, 1917, 1 K. B., 370; *Chinese Mining Co. v. Sale*, 1917, 2 K. B., 599; 22 Com. Cas., 352; and see p. 49, *supra*.

If a physical obstacle to the performance of a charter arise—such as stranding or collision—which may or may not cause long detention, no one would claim that the charter is ended without some evidence as to the probable duration of the delay. Why is it different with a legal obstacle? In case of the stranding or collision, the delay would be excused if the charter contained a suitable exception, but the obligation to perform would persist unless and until it became evident that extraordinary delay would ensue. The present, too, is a particularly strong case because the cancelling clause (quoted above, p. 2) plainly indicates that, even though the ship might be delayed beyond her cancelling date, it was the duty of the owner to tender her at the loading port, and that the charterers would then be entitled to make their election as to cancellation. Moreover, the cancelling date was still five weeks away. Yet here the owners absolutely and finally repudiated the charter as soon as they had made their arrangements with the Admiralty.

All the decisions in requisition cases turn on the probable duration of the requisition. Either this is established by evidence or, if sufficient information appears in the record, is found by the Court from the circumstances. Unless in one way or another it appears that the requisition will last for an unreasonably long time, the contract stands unaffected. So in *Modern Transportation Co. v. Duncric SS. Co.*, 1917, 1 K. B., 370; 13 Asp. M. C., 490, the charter was for a year. The vessel was requisitioned after five months' service and released after six months. It was held that the charter was not ended.

Such cases, while recognizing the principle of frustration, decline to apply it where it is not shown that frustration has really taken place. They stand for the proposition that reasonable inquiry must be made and the probable long duration of the obstruction be clearly established before a case of frustration arises.

It may be argued that the rights of the parties should, for reasons of commercial convenience, be determined *eo instanti*, and that they should not be obliged to wait, in uncertainty as to their rights, for a long period. Everyone will agree that this is desirable. But it does not at all follow that either party is entitled, the moment he hears of the obstacle, to repudiate all responsibility, without evidence and without inquiry as to whether or not there is really going to be a frustration. The statement sometimes made that the rights of the parties are fixed *eo instanti* does not mean that there is always a frustration, nor does it mean that either party may on the instant take it for granted that there is a frustration without waiting long enough to make an intelligent effort to find out.

Still less does it mean that one party is at liberty to make such a voluntary fixture as was made here and thereby cut off all possibility of an early release.

It is said that in commercial contracts time is of the essence. But it does not follow that any delay, especially a delay not due to the act of either party, entitles one party to repudiate over the protest of the other. Still less is such a result possible when the contract, as here, fixes no time for performance. And the argument loses all force when it is remembered that paragraph 8 of this charter gave the charterers the option to "maintain" the charter if the vessel missed her cancelling date.

Turn the case around. Suppose that the charterers, hearing that the *Baron Ogilvy* had been requisitioned, had instantly cabled the owners that they considered the charter at an end. Suppose then that the owners had succeeded in procuring the vessel's release and had tendered her at the loading port by May 15th. The charterers would certainly have been liable if they had refused to load her. It would have been impossible for them to justify a repudiation of the charter based on nothing but the mere fact of a requisition. Certainly, if either party is bound, then both are.

The cases where delay has been held to work frustration fall into two classes: (1) Where the attendant circumstances show that the detention is bound to be inordinately long—*i. e.*, where it will of necessity last as long as a war lasts; (2) where facts are proved which show that it will last inordinately long—*e. g.*, where there is damage which cannot be repaired for a long time or where there is evidence that a requisitioned ship is certain to be kept for a long period.

Unless, in one or the other of these ways, the length of the detention is made manifest, the Court will not overthrow the contract of the parties. The present case does not fall within either of the classes referred to; and contracts should be set aside only when the circumstances very clearly require it. The doctrine of frustration is a dangerous one. It is applicable only when the Court can clearly say that, if the parties had expressly dealt with the situation presented, they would have done so by abrogating the contract. As Lord Sumner said in *Bank Line v. Capel & Co.*, 1919 A. C., 435, at 460:

"The danger in each case so put is that the jury will think that the contract is as wax in their hands. A. T. Lawrence, J., puts the matter very usefully thus in *Souter's case*, 1917, 1 K. B. at p. 249: '*No such condition (i. e., that the contract is to be considered at an end) should be implied when it is possible to hold that reasonable men could have contemplated the circumstances as they exist and yet have entered into the bargain expressed in the document.*'"

In *Comptoir Commercial Andersons v. Power Son & Co.*, 1920, 1 K. B., 868, it was held that a contract for the sale and shipment of wheat was not dissolved by the fact that war had broken out and that it was impossible to secure insurance against war risks and consequently to sell exchange, which was the customary method of financing such a transaction. In holding that no defense was established, Lord Justice Scrutton said (1920, 1 K. B., at 899, 900):

"They (the courts) ought not to imply a term merely because it would be a reasonable term to

include if the parties had thought about the matter, or because one party, if he had thought about the matter, would not have made the contract unless the term was included; *it must be such a necessary term that both parties must have intended that it should be a term of the contract and must have only not expressed it, because its necessity was so obvious that it was taken for granted.*"

If this Court is seeking to ascertain and apply the presumed intent of the parties, how can the Court find on the present record that the charter is terminated? If it had been foreseen that, five weeks prior to May 15th, the British Government, desiring vessels "for some weeks" to carry hay, would take the *Baron Ogilvy*, what reason is there to suppose that the charterers would have said that they did not want the ship at all? Tonnage was not plentiful, rates were rising (fols. 185, 209); in all human probability the charterers would have said just the opposite—that even if the ship would not be ready by her cancelling date, she must report for loading in accordance with the charter as soon as she could, and that she would then be used.

It must also be constantly borne in mind that the owners deliberately put it out of their power to perform the charter for six or seven months. The ship might have been released from the original requisition in a few weeks. They deliberately made it certain that she would not be. Surely a man cannot, by his own act and for his own advantage, change an indefinite detention of possibly very short duration into a definite detention of certainly long duration, and then use the condition thus created by himself as a reason why he should be excused from his contract. The owners

first tied up their vessel for four round trips and then immediately repudiated all obligations. They might have said: "We are prevented for the moment from performing; but, if the restraint is lifted within any reasonable time, we will at once carry out our agreement." That would have been the course required by the authorities discussed above. They might at least have made inquiries as to the probable duration of the requisition before they threw up the charter. Instead, on the very same day, they fixed the ship for a prolonged period and said: "We will have nothing more to do with you." Even if an excuse exists in so far as there is a Government restraint, it surely ceases when an owner voluntarily subjects himself to a greater and longer restraint than he has to, and does it to get better rates.

The owners have not proved that the requisition caused such an interruption of the vessel's service as to terminate the charter. They have at most proved a requisition of uncertain, but probably moderate, duration, *for which they chose to substitute a voluntary engagement* for an extended period. No decision has ever upheld such a defense.

Courts should not apply the doctrine of frustration save in the clearest cases. These parties must have had in view the possibility of requisition; yet they made their contract absolute. The charterers stipulated that the ship should report for loading even after the cancelling date—they evidently wanted her whenever they could get her. What power has a Court to deprive the charterers of the right for which they expressly stipulated—that the ship should report for loading, whether she arrived early or late? The same question came up in *The Progreso*, 50 Fed., 835, where the Circuit Court

of Appeals for the Third Circuit held that it was the duty of the vessel, under a similar clause, to tender under the charter, even though it could not be done for more than a month after the cancelling date. The Court said:

"The transportation of the cotton was the object to be attained. Whether that transportation commenced on October 1st or November 1st was not as material as that the cotton should be transported. This is evidenced by the fact that delay in arriving at the port of lading did not avoid the contract by its terms, but such avoidance for such cause lay solely in the discretion of the charterers."

Nothing in this record warrants a finding that the charter could not have been performed within a reasonable time, had not the owners prevented it by engaging for four voyages. The case is not within either the rule or the reason of the rule which the decisions on frustration have laid down.

THIRD.

The alleged requisition was not in reality a legally valid requisition. The diplomatic officers of a foreign government cannot, by *ex parte* statements, preclude the Courts of the United States from ascertaining the true facts with regard to it; nor should the Courts of the United States receive or act on such statements, at least unless made through and with the sanction of the Department of State.

As has already been stated (p. 14, *supra*), the British Ambassador appeared through counsel at

the trial of this case, and offered in evidence a certificate and suggestion, which were received by the Court over the objection and exception of the charterers' counsel. A similar procedure has been followed in certain other cases, referred to below, in the lower courts.

In order that the various cases involving the effect of such action by a foreign ambassador might be heard together, counsel for the owners herein moved that this case be advanced for hearing with No. 167, which is the *The Carlo Poma*, *infra*, p. 69. While the two cases are of quite different characters, still the question of the status of such ambassadorial certificates is substantially the same in both.

It will be noted that the matter of the certificate is involved in some, but not in all of the questions arising in the present case. It is obviously involved in the question whether there was or was not a real and valid requisition, but it is not involved in the questions discussed in the First and Second Points above, namely, whether, assuming that there was a requisition, the contract was thereby brought to an end and the respondents relieved of liability.

1. The telegram of April 10, 1915, did not constitute a valid requisition.

As already pointed out, the only act done by way of requisition was the sending of the following telegram (p. 180, fol. 538) :

"Hogarth Glasgow S S *Baron Ogilvy* is requisitioned under Royal proclamation for government service."

The Royal proclamation referred to, which appears at pages 204-205, authorizes the Lords Commissioners of the Admiralty,

"by warrant under the hand of their Secretary or under the hand of any Flag Officer of Our Royal Navy holding any appointment under the Admiralty, to requisition and take up for Our service any British ship," etc.

The telegram was sent by a Mr. Foley, a subordinate official in the service of the British Admiralty.

The requisitioning telegram by its own terms was grounded upon the proclamation. No warrant or other action of the Secretary of the Lords Commissioners of the Admiralty or of any Flag Officer was ever taken. The requisition obviously and on its face was wholly outside the authority of the very document on which it purported to be based. The evidence of Sir Henry Erle Richards, who testified orally at pages 120 to 131, and whose written opinion appears at page 159, is to the effect that requisition by means of the telegram in question was not a valid action under the proclamation, and was not otherwise valid. It appeared from the evidence of Mr. Foley, who was assistant to the Director of Transports (p. 79, fol. 235), that ordinarily an official requisitioning letter was sent (p. 82, fol. 245), but that this was not done in the present case. Such a letter, if signed by one of the persons designated in the proclamation, would be, no doubt, a valid requisition. There was, however, nothing in the nature of the "warrant" required by the proclamation (p. 86, fol. 257). It was the opinion of Sir Henry Erle Richards that under these circumstances there was no valid requisition (p. 160, fols. 478-479). In answer to the contention

that the requisition might be supported as an exercise of the prerogative of the Crown apart from the proclamation, he points out (1) that the telegram "purports to derive authority from the proclamation and not from the prerogative alone"; (2) that the prerogative of the Crown cannot be exercised by any subordinate, but must be exercised by "an official of high rank or an official specially authorized. Mr. Foley himself without special authority could not exercise the prerogative and, as I have pointed out, he did not purport to do so" (p. 160, fol. 479).

The British Embassy seemingly denies the right of our Courts to examine and construe the Royal Proclamation and the acts purporting to be done thereunder. Yet in *King v. Delaware Insurance Co.*, 6 Cranch, 71, where an American vessel was warned by a British warship not to go to her destination on account of a blockade, this Court examined and construed the British Orders in Council and held that they did not prohibit the voyage in question and that therefore there was not a restraint of princes within the meaning of a policy of insurance on the freights. Surely that case would not have been decided differently if the British Embassy had avowed the act of the warship. So in *Corp v. United Insurance Co.*, 8 Johns., 277, an unauthorized threat of capture from a British cruiser was held not to constitute a restraint of princes under an insurance policy. These are clearly cases where acts done by the officials of foreign governments have been held unauthorized and therefore inoperative.

2. *The British Embassy's certificate and suggestion should not have been received, unless through the State Department, and could not, in*

any event, preclude the Courts of the United States from ascertaining the true facts and from adjudicating the rights of private litigants in accordance with the facts thus ascertained.

It was sought by the respondents to avoid any examination into the alleged requisition and its effect by the device of a suggestion and certificate from the British Embassy. Although the parties to this litigation are private persons, and although no relief is asked for against the British Government, still the diplomatic officers of that government have intervened and sought by an *ex parte* statement, not under oath, not subject to cross-examination, and not dealing with facts of which they have any personal knowledge, to determine conclusively issues both of fact and of law, and to compel the Courts of this country to accept such determination without question. That such a statement, judged by any ordinary rule of evidence, is utterly incompetent is obvious enough, but a similar procedure has been acquiesced in in other cases by the Circuit Courts of Appeals of the Second and the Third Circuits (see *The Carlo Poma*, 259 Fed., 369; *Agency of Canadian Car Co. v. American Can Co.*, 258 Fed., 363; *Earn Line Steamship Co. v. Sutherland Steamship Co.*, 264 Fed., 276; *The Adriatic*, 258 Fed., 902), and it has thus come about that American litigants in those courts have found a deaf ear turned to their evidence and their arguments because a foreign government has chosen to inject itself into the litigation and in effect to dictate to the Court certain conclusions of fact and law.

In the present case the respondents are claiming that the ~~fact~~ of foreign law prevented their performing their contract. It is certainly open to the Court to ascertain whether or not that is true. That inquiry necessarily involves determining whether foreign law did in fact interfere with the respondents' control of the *Baron Ogilvy*, and it is most earnestly urged that the *ex parte* statement of a foreign official to an American Court cannot possibly shut the eyes of the Court and foreclose the rights of an American litigant. It is submitted that it is nothing short of monstrous to hold that such suggestion and certificate are conclusive. It would be to confer upon foreign diplomatic representatives an unparalleled standing in court and to give them power which might, on occasion, give rise to serious abuse.

This case is a peculiarly good illustration of the danger of such proceedings, for, as pointed out below (p. 78), if the certificate and suggestion here in question mean what the owners' counsel contend that they mean, then they are untrue in fact and are shown to be so by the respondents' own evidence, including the testimony of the representative of the British Admiralty.

The owners' contention means that, in any suit involving directly or indirectly the act of a foreign government, its diplomatic representative may present to the Court an *ex parte* certificate as to the facts in controversy, and that the statements contained in such a certificate will be conclusive on the Court.

The well-recognized diplomatic practice is that all communications from foreign governments and their representatives are addressed to the Secretary

of State, who, subject to the direction of the President, has exclusive jurisdiction over such matters. The following statement of this rule may be quoted from the despatch of Secretary Seward to Mr. Dayton, Minister to France, June 27, 1862 (4 *Moore's Inter. Law Digest*, 686) :

"This Department is the legal organ of communication between the President of the United States and foreign countries. All foreign powers recognize it and transmit their communications to it, through the dispatches of our ministers abroad, or their own diplomatic representatives residing near this Government. These communications are submitted to the President, and, when proper, are replied to under his direction by the Secretary of State."

And conversely :

"It is not regular for any other authority than that of the department of foreign affairs in the country where diplomatists are accredited to address letters upon public business directly to them. When such other authority has occasion to communicate with them, this is invariably done through the department intrusted with the foreign relations of the country" (Mr. Fish, Sec. of State, to Mr. Cox, Jan. 22, 1874, 101 MS. Dom. Let. 169).

In *The Luigi*, 230 Fed., 493, where a vessel was libeled for breach of charter and counsel representing the Italian Government appeared and "suggested" that the vessel be released, as a public vessel in the service of the Italian Government, the Court (District Court, Eastern District of Pennsylvania, Thompson, J.) said :

"The Court was of the opinion that inasmuch as the suggestion raised a question of international

comity, it should come through official channels of the United States Government."

The Court accordingly refused to receive the suggestion, until it was renewed by the District Attorney, "at the instance of the Attorney General."

In *The Florence H.*, 248 Fed., 1012, a suit for collision, it was, on behalf of the Republic of France, suggested that, as the vessel and crew were in the employ of the French Government, the Court should not take jurisdiction. The Court said:

"A suggestion from the Secretary of State would be one thing, since he is charged with the responsibility for our relations with other powers. But a court which is not authorized to treat in any fashion with foreign powers should be in consequence quite inaccessible to any suggestion which is based upon international considerations."

So in the case of *The Isle of Mull*, 257 Fed., 798, now on appeal to the Circuit Court of Appeal for the Fourth Circuit, where an appearance and certificate similar to those in the case at bar were offered in a similar case on behalf of the British Government, Judge Rose refused to receive them and said (Stenographer's Minutes of Trial, p. 29):

"I cannot feel that a question of disputed fact between parties one of them a citizen of this country and one a citizen of England should be tried *ex parte* before the British Ambassador and decided *ex parte* by me. There is a difference of opinion among the experts as to what was done and you are at the instance of one of the parties having an *ex parte* trial of that question disputed in England before some one in the foreign office and the foreign office issues this certificate, which precludes further examination of the subject."

The undesirability of such practice could hardly be better expressed. Judge Rose also pointed out (Stenographer's Minutes, pp. 2 and 3) that the embarrassment which a court would feel in holding such a certificate to be untrue made it, in his opinion, the only safe rule to have the State Department first investigate the question, and that then, if the suggestion comes to the Court, accompanied by a similar suggestion from the State Department, it might be received.

In *South Carolina v. Wesley*, 155 U. S., 542, which was a suit for possession of certain land, the Attorney General of the State of South Carolina filed a suggestion to the effect that the property in question was occupied by the State for public purposes and asked that the suit be dismissed. The Trial Court denied this application, and the case was taken by writ of error to this Court. In dismissing the writ of error, this Court said:

"The record does not show that the averments of the suggestion were either proved or admitted, and it certainly cannot be contended that the Circuit Court ought to have arrested proceedings on a mere suggestion. *United States v. Peters*, 5 Cranch, 115; *The Exchange*, 7 Cranch, 116; *Osborn v. Bank of the United States*, 9 Wheat, 738; *United States v. Lee*, 106 U. S., 196; *Stanley v. Schwalby*, 147 U. S., 508."

If such suggestions are to be received at all, and particularly if they are to be given any conclusive effect, which last, it is submitted, should never be done, the Court should require that they come through the State Department, and that they be supported by the result of that Department's inquiry.

If, as contended by the owners, the Ambassador's certificate in the present case means that the vessel was requisitioned on April 10th, and was retained in service under the requisition until October 20th, then the certificate is in fact untrue, for, as we have already seen, the owners entered into an agreement in lieu of requisition, and it was under this, not under the requisition, that she remained in service until October 20th. This feature of the case is further referred to below (pp. 77, 78).

In the Court below, certain authorities were cited by the counsel for the owners as establishing that both this Court and the Courts of England uphold the practice of receiving such certificates and their conclusiveness. It is submitted that the cases referred to, which are briefly considered below, do not support any such propositions.

In *United States v. Peters*, 3 Dall., 121, a libel was filed for damages against a vessel commissioned by the French Government, for the alleged capture of a vessel of the United States. These facts appeared from an affidavit of the master of the French vessel, who moved for prohibition and, the motion having been heard on the proof thus offered, and *there being no dispute as to the facts*, the motion was granted. The case stands for nothing more than the proposition that a libel against a public vessel commissioned by a foreign government will be stayed by a prohibition upon application made by affidavit *where the facts are undisputed*.

The Exchange, 7 Cranch., 116, holds simply that a foreign public vessel is not subject to the jurisdiction of the United States courts. In that case the facts were made to appear by the intervention

of the United States District Attorney *at the instance of "the Executive Department of the Government of the United States,"* who filed a suggestion stating the facts. The commission from the French Government under which the vessel sailed was also produced and supported by affidavits of the master and of the French Consul. It therefore appeared both by the certificate of the proper officer of the United States and by affidavits what the character of the vessel was and her flag, commission and possession by French officers were all proved by competent evidence, and not merely by the suggestion of a foreign government. Here again there was *no dispute about the facts.*

In *Dupont v. Pichon*, 4 Dall., 321, the question was as to the immunity from arrest of the French *chargé d'affaires*. His official character was proved (1) by the production of his credentials and (2) by the taking of his deposition. Even with that proof, the Chief Justice "seemed inclined to wait for information from the Department of State, as to his actual reception by the President in that character." But, since it appeared that to wait for this would involve imprisoning him in the interim, the Court finally discharged him.

In *The Parlement Belge*, L. R. 5 P. D., 197, the facts as to the character of the vessel appeared from an intervention of the Attorney General. In that case, therefore, the Court had the certificate of the proper officer of its own government before it.

The Constitution, L. R. 4 P. D., 39, is the only one of the cases referred to where a foreign repre-

sentative appears to have communicated directly with the Court. There the Minister of the United States wrote to his solicitors a letter which was read to and considered by the Court. The Admiralty Advocate representing the British Government also intervened and protested against the exercise of jurisdiction, so that here, too, the Court had the representative of its own government before it. Here also the facts were not disputed.

In *The Crimdon*, 35 T. L. R., 81, the Court held that a Swedish steamship under time charter to the United States Shipping Board Emergency Fleet Corporation was not subject to process. There the facts appeared by an affidavit to which were attached letters, the nature of which does not appear from the report, but which apparently stated the facts as to the employment of the vessel. These facts were not disputed.

The foregoing cases indicate that the practice of communicating directly with the Court and of claiming that the Court is bound by such communication is not supported by the cases in this court and in the English courts which are referred to. It is also to be observed that in the present case there is very much more than a certificate as to a mere undisputed fact. There is presented to the Court a statement involving controverted facts and also conclusions both of fact and of law. There is also before the Court evidence showing what the true facts are, *i. e.*, that the vessel was employed under a voluntary charter.

FOURTH.

Whether or not the requisition was valid, the employment of the *Baron Ogilvy* from April to October, 1915, was not under any requisition but under a voluntary charter, and the certificate of the British Embassy should not be construed as contradicting this undisputed fact.

If it be conceded that the requisition was valid, the fact still remains that, instead of taking the benefit of the possible early release from requisition, the owners definitely postponed any such release for a period of nearly seven months by entering into a voluntary charter at better freight rates. When closely analyzed it will be seen that the suggestion and certificate of the British Ambassador were carefully drawn and do not, in fact, allege that the vessel was under requisition during this period. They set forth in nearly the same language (p. 42, fol. 126; p. 44, fol. 130) that the vessel was requisitioned on April 10, 1915, but they do not say that she remained under requisition. They go on to allege

"That the period of the said requisition was indefinite; and that from and after the date of requisition the steamship *Baron Ogilvy* was continuously in the service of the British Government and was operated solely under the orders and direction of the British Admiralty until October 20th, 1915."

Therefore, even if full effect be given to the suggestion and certificate, they do not establish that the vessel was operated *under requisition* during

the intervening months, but merely that she was requisitioned on April 10th and was thereafter operated in the service of the Admiralty, a service which the other evidence shows to have been simply a charter or contract of carriage. The making by the respondents of such a contract of carriage was a breach of their charter with the petitioner.

The owners seemingly contend that the Embassy's certificate means that the requisition did in fact continue for the entire period from April to October. Since the evidence to the contrary is embodied, not only in the owners' own correspondence and testimony, but also in the evidence of the witness called from the British Admiralty itself, and since there is no contradiction whatever of this evidence, the fact as thus proved is manifestly established in the case. It is possible, as indicated above, to construe the Embassy's certificate to be consistent with the facts thus proved and therefore it should be so construed; for surely no Court will, unless obliged to do so, construe such a document to state facts which the Court knows to be untrue.

If, however, the certificate is to be construed as meaning that the vessel continued under requisition until October, then the present case vividly illustrates the dangers inherent in the admission in evidence of such documents. Such a construction would leave the British Embassy in the position of asking the Court to accept and to treat as conclusive a certificate setting forth facts which are known to be untrue, and which are established to be untrue by the evidence of the Admiralty's representative himself.

FIFTH.

The respondents, after the happening of the alleged requisition, did not make efforts to secure the release of the vessel or to substitute other tonnage.

It is admitted by the respondent Hogarth (pp. 61, 64, 65, fols. 181, 182, 190, 191, 194) that no attempt whatever was made to secure the release of the *Baron Ogilvy* from requisition or to shorten the period of requisition, or to get the Admiralty to take, in place of the *Baron Ogilvy*, one of the other unrequisioned vessels of the same fleet. The Court below held that the respondents were under no obligation to make any such effort (p. 235, fol. 705). It is submitted that this was error. The law is plain that if a ship strands or is in collision or encounters any other similar obstacle, her owner must use all reasonable means to repair her and to make her ready to perform her charters as quickly as reasonably possible. There is no ground for applying a different rule to a case of requisition. If the owner can by reasonable efforts secure the release of the vessel or the shortening of the requisition period, he ought to do so. It is common knowledge that many such releases were secured on application, especially in the early part of the war. In the present case the owners made no effort whatever of this kind.

Nor did the owners make any efforts to substitute any other vessel. The charter is peculiar in its phraseology. It recites (fol. 449) that it is "made between J. H. Winchester & Co., Inc., . . . agents for owners of a first-class steam vessel owned by Messrs. Hugh Hogarth & Sons of Glas-

gow, and name of vessel to be declared on or before March 15th, 1915," etc. It appears from the evidence that the *Baron Ogilvy* was not owned by Hugh Hogarth & Sons, but by Hogarth Shipping Company, Ltd., although Hugh Hogarth & Sons were the agents and apparently the managers of the owner. There were other vessels not under requisition belonging to the same fleet. The Hogarth Shipping Company and the Kelvin Company, both controlled by Hugh Hogarth & Sons, owned between them about twenty vessels, of which eight appeared to have been under requisition at the time (p. 47, fols. 139-140). Where the charter is for one vessel of a certain fleet and where the vessel named encounters such an obstacle, it would seem that an obligation fairly arises to furnish another vessel within a reasonable time. Thus, in *Williams v. Vanderbilt*, 28 N. Y., 217, a steamship owner contracted to carry the plaintiff from New York to San Francisco, and the steamer *North America* was named as the vessel to perform the first stage of the voyage. She was lost, and the shipowner contended that that discharged him from his obligation; but the Court held that the identity of the vessel was a mere incident of the main object of the contract; that the contract could be substantially carried into effect by the use of another vessel, and that the shipowner was liable. It is submitted that the same ruling should apply to the present situation.

SIXTH.**The opinion of the Trial Judge.**

The opinion of Judge Hough appears at pages 234 to 238 of the record. Since the Circuit Court of Appeals wrote no opinion, brief comment will be made on that of the District Court.

Judge Hough correctly held that the charter contained no restraints of princes clause and no other clause of equivalent effect. He avoided any decision as to the effect of the Embassy's certificate. For reasons already given, it is submitted that he fell into error in expressing the opinion (p. 235, fol. 705) that the respondents were not bound to use efforts to prevent the requisition.

The opinion goes on (pp. 235-236, fols. 705-706) :

"It was entirely within their right to seek (when governmental rise [use?] was certain) the carriage of mules instead of something else, if mules promised less loss than other probable freight. This they did—nothing more."

The learned Judge at this point seemingly failed to note one of the most important points in the case. If the owners had done only what the Judge says they did—namely, substituted mules in place of hay as the cargo to be carried—the matter would, of course, be wholly immaterial. But they did a great deal more than this. They changed an indefinite, but probably not very long, period of government service into a very prolonged one by their own voluntary act and for the purpose of securing higher freights. By their interference they deprived the charterers of the benefit which would

have been derived from the vessel's early release. Instead of voyages for a few weeks with hay from Belfast, presumably to France, which was the service originally contemplated, they induced the Government to enter into a contract to charter their vessel for many months for a succession of trans-Atlantic voyages. This point is of the very first importance.

The opinion then proceeds to consider the question of impossibility, and finally rests decision on the ground that the so-called requisition amounted to destruction of the subject-matter of the contract. The fallacy of this view has already been commented on (pp. 37-38, *supra*). There would be more to say in favor of that view if there were any evidence in the case that the requisition was likely to be a prolonged one, or if the long duration of the vessel's government service had been due to the strong arm of the Government instead of to the voluntary action of the owners.

CONCLUSION.

The petitioner urges that there was here no valid requisition. If, however, it be found that there was a valid requisition, it is further urged that no act of the British Government can dissolve the contract, especially when the contract was made in contemplation of the very contingency which happened and when the parties failed to provide in the contract for that contingency. Moreover, it was not the requisition but the owners' act in prolonging the vessel's service by a voluntary agreement which led to the long delay. It is for

the owners, if they wish to claim frustration by delay, to establish that the requisition, if it had not been prolonged by the owners' contract with the Government, would have lasted so long as to cause "inordinate" delay. There is no such evidence in the case.

As regards the certificate and suggestion, such documents should preferably not be received at all. If received, however, they should come through the Department of State and should at most constitute *prima facie* evidence.

The decree should be reversed and the cause be remanded, with instructions to enter a decree for the petitioner (the libellant below) for the damages sustained by it.

New York, January 7, 1921.

JOHN W. GRIFFIN,
Counsel for Petitioner.

JAN 24 1921

JAMES L. GANER

CLERK

Supreme Court of the United States

October Term, 1920.
No. 555

THE TEXAS COMPANY,

Libellant-Petitioner,

against

HOGARTH SHIPPING COMPANY, LTD., owner of the Steam-
ship *Baron Ogilvy*, and HUGH HOGARTH & SONS,

Respondents.

BRIEF ON BEHALF OF RESPONDENTS.

JOHN M. WOOLSEY,

Counsel.



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- (1) *When the steamship Baron Ogilvy was named on March 11, 1915, to perform the charter party, the contract became one relating to that particular vessel alone, as if she had been originally named therein.* 7
- (2) *The fact of the requisition is established conclusively by the avowal thereof by the British Embassy* 10
- (a) *The Embassy certificate and the appearance of its counsel as amici curiae* 10
- (b) *The appearance of counsel to the British Embassy as amici curiae was in accordance with approved practice, both here and in England, and it was in all respects proper for the Court below to allow it.*

Each Court has an inherent right in the exercise of its judicial discretion to allow appearances before it of amici curiae.

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SUPREME COURT OF THE UNITED STATES.

THE TEXAS COMPANY,
Libelant-Petitioner,

against

HOGARTH SHIPPING COMPANY,
LTD., owner of the Steamship
Baron Ogilvy, and HUGH
HOGARTH & SONS,
Respondents.

October
Term,
1920.
No. 555.

BRIEF FOR RESPONDENTS.

STATEMENT.

This case comes before this Court on writ of certiorari to the Circuit Court of Appeals for the Second Circuit. The decision in the District Court is reported in 265 Fed. 375, Record, 715-720.*

The Circuit Court of Appeals affirmed the District Court without opinion. 267 Fed. 1023. Record, page 253.

* Unless otherwise stated all references are to folios of the record.

The case comes on for argument out of its regular place because it was advanced by order of this Court made December 6, 1920, to be argued with *The Carlo Poma*, No. 167, and *The Pesaro*, No. 317.

A. *The Pleadings.*

The libel, filed September 22, 1915, asked damages in the sum of \$50,000, for an alleged breach of a voyage charter party made at New York City on or about February 6, 1915, between The Texas Company, *hereinafter referred to as the libelant, or petitioner* and the Hogarth Shipping Company, Ltd., *hereinafter referred to as the respondent*. By that charter-party the libelant agreed to charter a steamship, which was to be declared on or before March 15, 1915, for a voyage from Port Arthur, Texas, to South African ports, with a cargo of petroleum in cases, steamer to load April 15 to May 15, 1915. *Libel*, 4-6. *Charter party*, 449-453, 456-457.

The charter-party contained the usual clause, providing to the charterer an option to cancel the charter-party if the vessel was not ready to load by two P.M. on May 15, 1915. *Charter*, Libelant's Exhibit 2, 456, 457.

The libel alleges that the steamship *Baron Ogilvy* was named by the respondents on or about March 11, 1915, for the performance of the charter party and claims that the respondent's subsequent failure and refusal to send the steamship or any steamship to Port Arthur for performance of the charter party entitles the libelant to the damages claimed. *Libel*, 7-9.

The charter was, therefore, a commercial contract for the use of the steamship Baron Ogilvy, or a voyage with

a cargo of petroleum in cases from Port Arthur to South Africa, which was to commence not later than May 15, 1915.

The answer of the Hogarth Shipping Company, Ltd., admits that the *Baron Ogilvy* was named for the performance of the charter party on or about March 11, 1915, and alleges that she was accepted by the charterer as the steamship by which the charter was to be performed. *Answer*, 18. It admits that the vessel did not perform the charter party and sets up as an excuse that on April 10, 1915, whilst the *Baron Ogilvy* was in London, she was requisitioned by the British Government for Government purposes and that thereby the charter party became impossible of performance, both in law and fact, and consequently the respondents were excused from performing it. *Answer*, 18-19, 29-32.

The answer also sets up that the provisions of a *special voyage charter clause*, putting the movements of the vessel under the orders of the British Government and providing for certain clauses to be included in all bills of lading, was a further defense to any claim for non-performance of the charter. *Answer*, 22-31.

The charter party did not contain the usual "restraint of princes" exemption and the defense, therefore, comes to this—

First: That the charter was frustrated by the Governmental act of the British Government, because that act as effectively destroyed the subject matter of the charter party, namely, the steamship *Baron Ogilvy*, as if she had been stranded, sunk or burned without the owner's fault.

Second: That the special voyage charter clause was the equivalent in effect of the usual restraint of princes clause.

The answer of Hugh Hogarth and Sons, filed January 17, 1916, admits that Hugh Hogarth and Sons are a co-partnership, but denies that they were the owners of the steamship *Baron Ogilvy*. *Answer*, 50.

The same separate defenses are set up as in the answer of the Hogarth Shipping Company, Limited. *Answer*, 51-68.

Apparently all claim against the co-partnership has been waived. *Statement of Libellant's Counsel*, 88.

B. *The Facts.*

The facts in respect of which the concurrent findings of both the lower courts are in favor of the respondent are as follows:

The charter party was entered into at New York on February 6, 1915, and provided for the naming of a first class vessel, Class 100A1 at British Lloyds, on or before March 15, 1915. *Libel*, 6.

On or about March 11, 1915, the steamship *Baron Ogilvy* was named by Messrs. Hugh Hogarth and Sons to fulfil the charter party. *Hogarth*, 138.

In the last part of March the *Baron Ogilvy*, in performance of a prior voyage, arrived at London. Her owners sent the Master a copy of the charter party and instructed him, in case of inquiry by Government officials,

to state that the vessel was already committed under the charter party to The Texas Company. *Hogarth*, 142.

On April 10th, while the *Baron Ogilvy* was still in London, the owners received the following telegram:

“Hogarth Glasgow,

S. S. *Baron Ogilvy* is requisitioned under Royal Proclamation for Government Service. Transports.” *Hogarth*, 159.

This telegram was sent by Mr. Ernest Julian Foley, Assistant Director (Military) to His Majesty's Director of Transports of the British Admiralty. *Foley*, 244.

Notice that the *Baron Ogilvy* had been requisitioned and would be unable to enter upon or perform the charter party, was immediately sent to the New York representatives of The Texas Company. *Record*, 101.

The vessel was at once taken over by the British Government, and remained continuously in the service of the Government until October 20, 1915, making several trips from New Orleans, Louisiana, to Avonmouth, England, with mules. *Hogarth*, 162-3; *Foley*, 249; *Thompson*, 413-419. *Embassy Certificate*, 130.

C. *The Decisions Below.*

Judge Hough held:

That after the *Baron Ogilvy* had been named “the charter became an ordinary voyage charter for that vessel and none other,” 703;

That there was in fact a requisition of the vessel by the British Government, 704;

That it was not necessary to have recourse to the Ambassador's certificate for the proof of this because on the evidence the requisition was independently proved, 704;

That the owner did not cause or contribute to the Government's taking the *Baron Ogilvy*, 705; and

That after the Government took her the "respondents were under no legal obligation to substitute another vessel for the *Ogilvy* any more than they were bound to make a new charter with the libelants. Legally the two propositions are identical," 706.

Judge Hough, therefore, found that the owner was excused from the performance of the charter party by a supervening impossibility of performance, which amounted in effect to the destruction of the subject matter, i.e., the *Baron Ogilvy*. Judge Hough stated that he preferred the phrase "impossibility of performance" to the phrase "frustration of venture" as a description of what had happened to discharge the parties from liability. 708-713.

In pursuance of this opinion, a decree was entered on February 21, 1919, dismissing the libel on the merits with costs. 715-720.

This decision was affirmed without opinion by the Circuit Court of Appeals for the Second Circuit. 759-763.

The facts in the case have, therefore, been concurrently found in favor of the respondent, and for the purposes of the argument in this Court under its repeated decisions, the facts are:

That the requisition of the *Baron Ogilvy* is proved to have been a Governmental Act of the British Government;

That this proof is by ordinary evidence quite independent of the certificate of the Ambassador;

That the requisitioning was against the wishes of the respondent;

That the respondent did not make a voluntary freight agreement with the British Government which prevented the performance of the charter with the libellant, but, on the contrary,

That the steamship *Baron Ogilvy* was taken and used by the British Government under its requisition, so as wholly to prevent and render entirely impossible the performance of the charter party here in suit.

The libellants applied for and secured a writ of certiorari on October 25, 1920.

FIRST POINT.

ON THE REQUISITION OF THE STEAMSHIP *BARON OGILVY* THE CONTRACT OF CHARTER PARTY WAS FRUSTRATED AND ALL RIGHTS AND OBLIGATIONS OF THE PARTIES THEREUNDER WERE TERMINATED.

(1) *When the steamship Baron Ogilvy was named on March 11, 1915, to perform the charter party, the contract became one relating to that particular vessel alone, as if she had been originally named therein.*

All other terms of the contract were agreed upon. This is apparent from the charter party. *Libelant's Exhibit No. 2*, 448-474.

It was so found by Judge Hough in his opinion below. He said 703:

“The charter named no special ship as the subject of hire for the voyage agreed upon; that was the only matter therein left open.”

Upon the naming of the *Baron Ogilvy* there was a meeting of minds on the only outstanding point of uncertainty.

The *Baron Ogilvy* was duly named on March 11, 1915, to perform the charter. *Hogarth*, fol. 138.

Far from disputing this fact, the libelant has made a sworn statement to that effect. *Libel*, fol. 7.

There is nothing in the pleadings or evidence to show that any objection was ever made by the libelant to the vessel. She must be deemed, therefore, to have been accepted by the libelant under the charter.

The rights and obligations of the parties after March 11, 1915, therefore, related only to the *Baron Ogilvy* and the charter party became one for the service of the steamship *Baron Ogilvy*.

The owner would not have had a right thereafter to substitute another vessel for her.

As Judge Hough said, 703:

“* * * but the moment the ship-owners named the *Baron Ogilvy* as the vessel to perform that agreement, the charter became an ordinary voyage charter for that vessel and none other. She was for all legal purposes the ship and the

only ship that would perform that particular agreement."

This is plain business common sense as well as good law.

In *Stoomvaart Maatschappij Nederlandsche Lloyd v. Lind*, 170 Fed. 918 (1909), a coal charter party gave charterer the option of three loading ports. He exercised the option by naming one, but finding no cargo there, sought to have the vessel sent to another loading port. To accomplish this purpose he made several offers to the owner, but they were not accepted. The vessel remained in the original port, where she eventually loaded.

In an action for demurrage by the owners, this Court reversed the decision below and granted the demurrage claimed for the entire period of the detention, on the ground that upon the naming of the port of loading the charter became *an agreement to carry coal from that port only* and, consequently, that there was not any obligation on the owners to go to any other port to load. In the course of the opinion Judge Ward said at page 919ff. (Italics ours):

"* * * Accordingly, August 9th, the charterer, after communicating with Washington, ordered the steamer to go to Baltimore for her cargo. This they had no right to do, because the charter had become, *by virtue of their ordering her to Newport News, an agreement to carry from Newport News to Honolulu.* * * * It is, however, equally true that one party cannot compel the other affirmatively to do something which the contract does not require of him. Men generally being reasonable, such departures from agree-

ments are usually accomplished amicably. Whether the ship owner in this case was reasonable or not in its refusal to shift to Norfolk, except upon its own terms, it had a right to refuse, because there was nothing in the charter compelling it to shift."

It is submitted that there is not any distinction in this respect between an option to name a loading port and an option to name a vessel and that, therefore, the case just cited is a precise authority for Judge Hough's decision on this branch of the instant case, and that his decision was right on this question.

(2) *The fact of the requisition is established conclusively by the avowal thereof by the British Embassy.*

(a) *The Embassy certificate and the appearance of its counsel as amici curiae.*

The British Embassy has certified under its official seal, as follows, 130, 131:

"IT IS HEREBY CERTIFIED that the British steamship *Baron Ogilvy* on April 10th, 1915, while lying in the port of London, England, was requisitioned by the Government of the Kingdom of Great Britain and Ireland for Government service under the prerogative of the British Crown; that the period of said requisition was indefinite and that after it became operative as aforesaid, the steamship *Baron Ogilvy* was continuously in the service of the British Government and was operated solely under the orders and direction of the British Admiralty until October 20th, 1915; that said steamship was of British registry and belonged to a cor-

poration created and existing under the laws of Great Britain and Ireland, and that the requisition of said steamship was a Governmental act by the Government of Great Britain and Ireland."

The British Embassy's counsel appeared as *amici curiae*, offered, and with leave of the court filed, a Suggestion which embodies the certificate, and further submits that neither the fact of the requisition, nor its effects should be inquired into by this court, and that the court should decline to adjudicate the cause, upon the grounds that it involves the relations between the British Government and the owner of a British steamship, calls for a determination by a United States Court of the effect of Government acts of the British Government, and involves an attempt to hold the respondent liable for acts of its Government. 124-129.

(b) *The appearance of counsel to the British Embassy as amici curiae was in accordance with approved practice, both here and in England, and it was in all respects proper for the Court below to allow it.*

Each Court has an inherent right in the exercise of its judicial discretion to allow appearances before it of amici curiae.

To have refused the request of the Ambassador of a friendly foreign nation would have been a grave breach of judicial discretion.

The inherent right and power of a Court to permit intervention by an *amicus curiae* and to decide to what extent it will hear him and give him credence has been established by long usage.

This right is a part of a Court's essential nature as a tribunal which seeks from whatever source procurable the information necessary to assist it in administering the law.

This right has perhaps been nowhere more pointedly expounded than by Judge Hough *arguendo* during the trial of the present case, 96-99.

The libelant's counsel objected to the intervention contending that the intervention should have been through the State Department and the Department of Justice. The following colloquy took place, 96-99:

"The Court: Well, I think that is my business, and not yours. If I, or the Court, chooses to listen to the first man that comes in off the street, what right have you to object?

Mr. Poor: Well, it seems to us that it seriously—

The Court: Litigants do not own the Court. The Court is here for the purpose of listening to anybody and everybody, that it may contribute to the proper administration of what we are pleased to call justice.

Mr. Poor: Well, it is perfectly well established in diplomatic practice that if the Ambassador wishes to deal with any governmental power or official he has to make his suggestion through the State Department, and if the Ambassador wishes to take up any question with any government official it is the correct thing for him to submit what he wishes to say to the State Department, and have the State Department, if it considers it proper, then to carry it on to the party whom the Ambassador wishes to reach. It seems to me that it is just as improper for a foreign Ambassador to di-

rectly attempt to intervene in a case before a Court, without the sanction of the Secretary of State, as it is to deal with any other department of the government, whether that department is——

The Court: I greatly resent that. I do not agree with you at all on that suggestion. It may be that the British Ambassador, if he chooses to come into a Court of the United States, or any other sovereignty, and make representations, may be violating diplomatic custom; but that this Court in any way, shape or manner depends upon any branch of the executive department of the Government of the United States, and more especially the Secretary of State, for aid, guidance, direction or order as to who it shall hear, or when, or how, I do not tolerate that suggestion at all. I am sitting here as a representative of an independent and equally historical branch of the Government of the United States, and I take no orders from the Secretary of State and no directions from him."

In the case of *Northern Securities Co. v. United States*, 191 U. S. 555 (1903), a motion for leave to file a brief as *amici curiae* was denied to counsel not connected with the case for reasons in no way apt here, but the Chief Justice said, at pages 555, 556:

"Where in a pending case application to file briefs is made by counsel not employed therein, but interested in some other pending case involving similar questions, and consent is given, the court has always exercised great liberality in permitting this to be done. And doubtless it is within our discretion to allow it in any case when justified by the circumstances. *Green v. Biddle*, 8

Wheat. 1, 17; *Florida v. Georgia*, 17 How. 478, 491; *The Gray Jacket*, 5 Wall. 370.²

In *The Employers Liability Cases*, 207 U. S. 463, at 490, the Court, after refusing a direct intervention by the Department of Justice, permitted the United States to appear and be heard as *amici curiae*.

This Court has permitted intervention by counsel to the British Embassy as *amici curiae* in the following recent cases :

Dillon v. Strathearn Steamship Co., 248 U. S. 182.

Strathearn Steamship Co. v. Dillon, 251 U. S. 348.

Ex Parte Muir (The Gleneden) No. 28, Oct. Term, 1918, argued January 7, 1919, still awaiting decision.

In the Circuit Courts of Appeal similar intervention as *amici curiae* by counsel representing Ambassadors, have been filed in the following cases :

Second Circuit—

The Claveresk, 264 Fed. Rep. 276.

The Carlo Poma, 259 Fed. Rep. 369.

Muir v. Chatfield, 255 Fed. Rep. 24.

Third Circuit—

The Adriatic, 258 Fed. Rep. 902.

Fifth Circuit—

The Strathearn, 256 Fed. Rep. 631.

Similar interventions have been allowed in several of the District Courts—

The Athanasios, 228 Fed. Rep. 558 (S. D. N. Y.).

The Strathearn, 239 Fed. Rep. 583 (N. D. Fla.).

The Maipo, 252 Fed. Rep. 627 (S. D. N. Y.).

The Adriatic, 253 Fed. Rep. 489 (E. D. Penna.).

The Roseric, 254 Fed. Rep. 154 (D. of N. J.).

The Claveresk, 254 Fed. Rep. 127 (S. D. N. Y.).

The Santa Cruz, (not reported, E. D. Va., June 28, 1919).

The Carlo Poma, (No. 167—To be argued with this case,—not reported).

The Pesaro, (No. 317—to be argued with this case—not reported).

New York State Courts have also allowed similar intervention:

Nankivel v. Omsk All Russian Government,
New York Law Journal, Oct. 28, 1920.

Marine Transport Service Co. v. Romanoff, New
York Law Journal, February 1, 1918.

The English Admiralty Court in the case of the frigate *Constitution* allowed an even more informal intervention on behalf of the American Ambassador to Great Britain than was made here in behalf of the Italian Embassy.

The Constitution, L. R. 4 P. D. 39.

So in *The Crimdon*, 35 Times Law Reports 81, intervention was allowed in the British Admiralty Court on

filing of letters from a United States Shipping Board representative in England stating that the United States Shipping Board Emergency Fleet Corporation was a governmental agency, that it had the *Crimdon*, a Swedish vessel, under charter, and that she had been assigned to the United States Army Transport Service.

In the case of *The Roserie*, 254 Fed. 154, where a suggestion was filed by counsel for the British Embassy claiming immunity, Judge Rellstab of the District Court of New Jersey, in dealing with the question of such a suggestion, said 254 Fed. at page 163:

“As to the source from which the suggestion came: What is to prevent one sovereignty from appearing in the courts of another sovereignty? Or, stated more to the point, why should the court of one sovereignty refrain from receiving a suggestion as to its lack of jurisdiction because it comes solely from the representative of a foreign sovereignty? It is not merely a proper, but a commendable, practice for such suggestions to come through the Attorney General or one of his representatives; but is it to be disregarded unless it does so come? No case has been cited that holds as matter of law that such a suggestion will not be received from a foreign sovereign’s official representative. True, in *The Luigi*, *supra*, upon an oral suggestion made in open court—seemingly as *amicus curiae*—for a foreign government—Judge Thompson said he ‘was of the opinion that, inasmuch as the suggestion raised a question of international comity, it should come through official channels of the United States Government.’

“In the *Florence II*, *supra*, Judge Learned Hand declined to receive the suggestion made on

behalf of a foreign sovereign that to assume further jurisdiction might result in diplomatic embarrassment, unless such suggestion came through the diplomatic channels of this government. But I do not understand that either Judge Thompson or Judge Hand denied the power of the court to receive the suggestion through any other channels.

"There may be good reasons in a given case why a suggestion from a foreign sovereignty should not be entertained, save through the executive branch of the government, of which the court is a part. To my mind, the sources from which such suggestion will be received is a matter of judicial discretion. Each case must be governed by its own circumstances, and *The Luigi* and *The Florence H.*, I take to be instances where, in the exercise of judicial discretion, it was thought best not to receive the suggestions made on behalf of foreign governments, unless they came through the executive department of our government, and not as determinations that no such suggestions would be received from any other source.

"In the instant case there are no considerations influencing the judicial discretion to refuse to act upon the suggestion made directly to the court by the British Embassy. On the contrary, from what has already been said concerning our national interests as a cobelligerent with the British government in the war pending at the time of the *Roseric's* seizure, they lead so obviously to an opposite determination that, in the absence of an intimation from the executive branch of this government that the public interests would be dis-served by receiving such suggestion, its rejection would not be justified."

In the case of *The Maipo*, 252 Fed. 627, Judge Mayer said, at page 628, in dealing with the suggestion and certificate by the Chilean Chargé d'Affaires:

“While, in many instances, the suggestion that a ship is the property and in the possession of a foreign government would be made to the court by the appropriate official or department of our own government, I fail to find any support for the proposition that such course is necessary. *In re Baiz*, 135 U. S. 403, 10 Sup. Ct. 854, 34 L. Ed. 222. It is enough that the fact is presented to the court, as here, by the duly accredited official of the foreign government.

“In response to an inquiry from proctors from the libelant and also for another shipper or consignee, our Department of State through the Third Assistant Secretary, has replied ‘that the department has no intention of interfering with the legal proceedings to which you refer.’ I cannot assume that this communication is intended to have any significance. It means, as I read it, nothing more than that the question is one for the courts to dispose of in due course. Doubtless the Chilean government has not deemed it necessary to bring the matter to the attention of the Department of State, but is willing, without further ado, that the points involved shall be passed upon by the court in orderly procedure without suggestion from our own government.”

It would seem on principle apparently recognized by these authorities that a Court is at liberty in the exercise of judicial discretion to choose its own friends and to give to the information which they may communicate

to it such weight as the Court considers the communications are entitled to receive.

Inasmuch as the purpose of the intervention is always stated to the Court when the intervention as *amicus curiae* is sought, the Court in the exercise of its *judicial* discretion if it feels that the intervention is not advisable, can on the threshold refuse to admit the intervention. Thus any embarrassment, which might thereafter occur, if the Court did not wish to give recognition to the statement which the friend of the Court purposes making, can be avoided.

The underlying error in the appellant's brief in dealing with the question of Ambassadorial intervention seems to be,

That it fails to recognize the inherent right and power in a Court to allow such intervention;

That it fails to realize the Court's *duty* in the exercise of its *judicial* discretion to admit Ambassadors of friendly Foreign Governments as *amici curae*, and

That it fails to realize that the necessary control which a Court has over the situation in a case will enable a Court to protect itself by refusing intervention whenever it thinks, in the exercise of a proper *judicial* discretion, wise to do so.

There has been recent instances where intervention by Ambassadors as *amici curae* has been sought and wrongly denied.

In the case of *The Isle of Mull*, reported in 257 Fed. 798, Judge Rose, in the District Court of Maryland, re-

refused to allow an intervention sought by the British Embassy similar to that allowed by Judge Hough below.

In the *Ile of Mull* immunity was not claimed. The suggestion merely was that the requisition was a governmental act. Judge Rose stated that before permitting intervention in such cases he would await an authoritative decision by a higher Court.

In the case of *The Appalachee*, 266 Fed. 923, Judge Smith, in the District Court for the Eastern District of South Carolina, for reasons substantially the same as Judge Rose gave, wrongly refused to allow an intervention by the British Embassy claiming immunity.

The fact that these interventions were attempted does not appear in either of the opinions, but counsel for the appellants in this case represented the ship in both those cases and has full knowledge of the situation. The fact of the refusal of the intervention in those two cases is confirmed by the statements in the brief of counsel for the British Embassy filed by leave of this Court in the present case.

It is submitted that these refusals to permit ambassadorial intervention were erroneous. They involved an improper exercise of discretion, and constituted appealable error.

The Ambassador may instruct consular officers to intervene in various classes of litigation.

The intervention of consular officers in cases of suits by seamen before the present Seamen's Act came into force was a commonplace of procedure in such cases, and often led the Courts to refuse jurisdiction.

The Ester, 190 Fed. 216 and cases there cited.

Unreported cases where consular protests have been sustained in counsel's own experience are *Kicklakis v. The Hermia* in the Southern District of New York, and *Norsman v. The Overland* in the District of New Jersey.

Cf. *The Belgenland*, 114 U. S. 355, 364, 365.

Rocca v. Thompson, 223 U. S. 317.

In any event, it is not for private litigants to make objection to an ambassadorial intervention, whatever its form may be, or to assign error, intervention being allowed. Objection can only properly be made by the Court itself or by our own Executive on proper diplomatic representation to the Ambassador who seeks to make the intervention or through him to his Government.

It is clear, therefore, that on principle and by well established precedent in our Courts, the District Court was right in allowing the intervention and suggestion of the British Ambassador in the present case.

Indeed, it is difficult to see how a foreign governmental fact or act of any kind could be established except by the statement in our Courts of the duly accredited representative of the Government in question.

It would be a strange and mediæval doctrine to hold that the accredited Ambassador of a friendly foreign nation should be denied access to our Courts to protect his country's interests and nationals unless he first secured permission from our State Department!

Foreign Ambassadors are not Ambassadors to the State Department but to the United States. The State Department accepts their credentials and then they are

free to act in any matters according to diplomatic usage.

It is true that most communications which they may wish to make are of a diplomatic nature and hence made to the Executive through the State Department.

But as Judge Hough points out our Judiciary is an independent and equally historical branch of our government.

Why, therefore, should not an Ambassador communicate to our Courts regarding matters which, in his opinion, involve his sovereign's rights or interests, or the interests or rights of his country's nationals, whether it be as to vessels or other property, provided always that his communications take such form as may be satisfactory to our Courts?

The appellants contend that the suggestion should have come through the State Department.

The only cases so far as counsel is aware in which the State Department has transmitted, through the Department of Justice, to the attention of a Federal Court during the recent war any information received from an Embassy was in the cases of *The Luigi*, 230 Fed. 493 and *The Attualita*, 238 Fed. 909. A certified copy of the record in *The Attualita* in the Circuit Court of Appeals for the Fourth Circuit is herewith submitted.

The suggestion, which was the same in form as in *The Luigi*, was there filed by the United States Attorney for the Eastern District of Virginia, as will be seen by an examination of the record of that case at page 8, did not certify to the truth of the statement of the Italian Embassy and did not even make a prayer for immunity, but merely submitted the fact that the vessel was requisi-

tioned by and in the service of the Italian Government for such consideration as the Court might deem necessary and proper.*

It is difficult to see how such a procedure differs in any *essential* way from the procedure followed here, where counsel in good standing before the Court comes into court, and asks leave to file a suggestion of the duly accredited Ambassador from the Kingdom of Great Britain and Ireland.

The procedure in *The Attualita* and *The Luigi* was merely a roundabout way of doing something which was as conventionally and properly done in a direct way in this case.

The Italian Embassy had to appear by counsel as *amici curiae* in both *The Attualita* and *The Luigi*.

The question after all is merely one of the authenticity of the representation made to the Court. That is as satisfactorily established by appearance of counsel in good

* The suggestion in the *Attualita* was as follows:

I, Richard H. Mann, United States Attorney for the Eastern District of Virginia, acting under the direction of the Attorney General of the United States, respectfully bring to the attention of the Court that the Attorney General of the United States has received from the Secretary of State of the United States a communication dated September 15, 1916, to the effect that the Secretary of State has been advised by the Italian Ambassador that the Italian Steamship *Attualita* which has been libeled and attached in this proceeding, was at the time of the said attachment and is now requisitioned by the Italian Government; and was at the time of said attachment and is now in the service of the Italian Government; and I am further directed to call the attention of this Court in this connection to *The Luigi*, 230 Federal Reporter 493.

In bringing this matter to the attention of the Court, the United States does not intervene as an interested party, nor do I appear either for the United States or for the Italian Government, but I present the suggestion as *amicus curiae*, as a matter of comity between the United States Government and the Italian Government, for such consideration as the Court may deem necessary and proper.

RICHARD H. MANN,
United States Attorney.

By HIRAM E. SMITH,
Ass't United States Attorney.

standing as in any other way, for counsel are officers of the court.

(c) *The validity of the requisition is conclusively established by the certificate and avowal of the Embassy.*

The act of requisitioning of the *Baron Ogilvy* occurred within British territory.

“The acts done under the authority of one sovereign can never be subject to the revision of the tribunals of another sovereign.”

Per Story, J., in *The Invincible*, 2 Gall. 29.

This rule has been repeatedly and very recently re-affirmed.

See

Underhill v. Fernandez, 168 U. S. 250;
American Banana Co. v. United Fruit Co., 213 U. S. 347;
Oetjen v. Central Leather Co., 246 U. S. 297;
Ricaud v. American Metal Co., 246 U. S. 304;
Hewitt v. Speyer, 250 Fed. 367;
The Santissima Trinidad, 7 Wheat. 283;
The Athanasios, 228 Fed. 558;
The Florence H., 248 Fed. 1012, 1017;
The Adriatic, 253 Fed. 489, 258 Fed. 902.

English cases laying down the same principle are:

Capel v. Souliidi (1916), 2 K. B. 365;
The Zamora (1916), 2 App. Cas. 77, 92;
The Parlement Belge, L. R. 5, P. D. 197.
The Duke of Brunswick v. The King of Hanover,
 2 H. L. Cas. 1;

Secretary of State v. Kamachee, 13 Moore P. C.
22;

Burn v. Denman, 2 Exch. 167;

Dosc v. Secretary of State, L. R. 19 Eq. 509.

The validity and Governmental nature of the requisition of the *Baron Ogilev* established by the Embassy certificate cannot be challenged in our Courts.

The reason for this rule, which is thoroughly established, is that to submit to a judicial investigation of the facts stated in the suggestion would be to submit to the jurisdiction of the Court and it is well settled that a foreign sovereign or Government can not be made subject *in invitum* to the jurisdiction of our Courts.

In the case of *The Parlement Belge*, L. R. 5, P. D. 197, in which the English Court of Appeal held that an unarmed packet belonging to the King of the Belgians was immune from process in spite of the fact that the vessel carried merchandise for freight and passengers for hire, Lord Justice Brett said in dealing with the conclusiveness of the representations, at page 219 (Italics ours):

“* * * the ship has been by the sovereign of Belgium, by the usual means, declared to be in his possession as sovereign, and to be a public vessel of the state. It seems very difficult to say that any Court can inquire by contentious testimony whether that declaration is or is not correct. *To submit to such an inquiry before the Court is to submit to its jurisdiction. It has been held that if the ship be declared by the sovereign authority by the usual means to be a ship of war that declaration cannot be inquired into.* That was expressly decided under very trying circumstances

in the case of *The Exchange*. Whether the ship is a public ship used for national purposes seems to come within the same rule."

In Hall on International Law (4th Ed.) Sec. 44, page 167, it is said (Italics ours) :

"Public vessels of the state consist in ships of war, in government ships not armed as vessels of war, such as royal or admiralty yachts, transports, or store ships, and in vessels temporarily employed, whether as transports or otherwise, provided that they are used for public purposes only, that they are commanded by an officer holding such a commission as will suffice to render the ship a public vessel by the law of his state, and that they satisfy other conditions which may be required by that law. [Ortolan, *Dip. de la Mer*, i. 181-6; Calvo, §876-84.] The character of a vessel professing to be public is usually evidenced by the flag and pennant which she carries, and if necessary by firing a gun. When in the absence of, or notwithstanding, these proofs any doubt is entertained as to the legitimacy of her claim, the statement of the commander on his word of honour that the vessel is public is often accepted, but the admission of such statement as proof is a matter of courtesy. On the other hand, subject to an exception which will be indicated directly, the commission under which the commander acts must necessarily be received as conclusive, it being a direct attestation of the character of the vessel made by competent authority within the state itself. [The *Santissima Trinidad*, vii Wheaton, 335-7; Ortolan, *Dip. de la Mer*, i. 181; Phillimore, i § cccxlviii.] *A fortiori* attestation made by the government itself is a bar to all further enquiry."

In a footnote to this section, in dealing with the word of honor of a Commander, the author says:

“The admission of the word of the commander is sometimes regarded as obligatory. When the *Sumter* was allowed to enter the port of Curacao, the Dutch government answered the complaints of the United States by pointing out that the commander had declared the vessel to be commissioned, adding that ‘le gouverneur néerlandais devait se contenter de la parole du commandant, couchée par écrit.’ Ortolan, *Dip. de la Mer*, i. 183.”

In a footnote dealing with an attestation made by a government, and citing *The Parlement Belge*, the author says:

“This (i.e. attestation by a government) is the case even where on the acknowledged facts there may be reasonable doubt as to whether the vessel is so employed as to be in the public service of the state in a proper sense of the term.”

This section from Hall was quoted with approval by Mr. Justice Brown in the case of *Tucker v. Alexandroff*, 183 U. S. 424, at page 441.

The conclusiveness of such suggestions has been recognized and the rule laid down has been approved in many leading cases in this country. Examples are:

The Exchange, 7 Cranch. 116.

The Maipo, 252 Fed. 627.

The Adriatic, 253 Fed. 489.

The Roseric, 254 Fed. 154.

Agency of Canadian Car & Foundry Co. v. American Can Co., 258 Fed. 363; affirming 253 Fed. 152.

The Adriatic, 258 Fed. 902.

The Carlo Poma, 259 Fed. 319.

The Claveresk, 264 Fed. 276, 280.

Texas Company v. Hogarth, 267 Fed. 1023, affirming 265 Fed. 375.

To the same effect also many English cases:

The Constitution, L. R. 4, P. D. 39.

The Crimdon, 35 T. L. R. 81.

In the Goods of Anne Dumoy, 3 Hagg. Eccl. 767.

In the Goods of Klingemann, 3 Swab. & T. R. 18.

In the Goods of Prince Oldenberg, L. R. 9 P. D. 235.

At page 34 of the appellants' brief they make the statement that in the case of *The Attualita*, 238 Fed. 909, evidence was taken in respect of the relation of the Italian Government to the *Attualita*, in spite of the fact that a suggestion had been filed by the United States Attorney.

Counsel for the appellee in the present case was counsel for the libelant in the *Attualita* case and has knowledge of all the proceedings had therein.

The explanation of the fact that testimony was taken was that counsel for the libelant, while he admitted that he could not challenge the truth of the statements contained in the suggestion, demurred to them on the ground that inasmuch as they did not state either ownership or possession in the Italian Government, they did not state

sufficient reasons for claiming that the *Attualita* was a public ship or immune for any other reason.

In the case of *The Santissima Trinidad*, 7 Wheaton 283, Mr. Justice Story, held conclusive the proof of ownership of a vessel by a foreign sovereign, where the Commission of her captain was introduced in evidence. He said at pp. 335-336—

“It is not understood that any doubt is expressed as to the genuineness of Captain Chaytor’s commission, nor as to the competency of the other proofs in the cause introduced, to corroborate it. The only point is, whether, supposing them true, they afford satisfactory evidence of her public character. We are of opinion that they do. In general, the commission of a public ship, signed by the *proper authorities of the nation to which she belongs, is [*336] complete proof of her national character. A bill of sale is not necessary to be produced. Nor will the courts of a foreign country inquire into the means by which the title to the property has been acquired. It would be to exert the right of examining into the validity of the acts of the foreign sovereign, and to sit in judgment upon them in cases where he has not conceded the jurisdiction, and where it would be inconsistent with his own supremacy. The commission, therefore, of a public ship, when duly authenticated, so far at least as foreign courts are concerned, imports absolute verity, and the title is not examinable. The property must be taken to be duly acquired, and cannot be controverted. This has been the settled practice between nations; and it is a rule founded in public convenience and policy, and cannot be broken in upon, without en-

dangering the peace and repose, as well of neutral as of belligerent sovereigns."

To the same effect is *The Exchange*, 7 Cranch. 116, where Chief Justice Marshall said, at page 147:

"The principles which have been stated, will now be applied to the case at bar.

"In the present state of the evidence and proceedings, *The Exchange* must be considered as a vessel, which was the property of the libellants, whose claim is repelled by the fact that she is now a national armed vessel, commissioned by, and in the service of the emperor of France. The evidence of this fact is not controverted. But it is contended that it constitutes no bar to an inquiry into the validity of the title, by which the emperor holds this vessel. Every person, it is alleged, who is entitled to property brought within the jurisdiction of our courts, has a *right to assert his title in [*147] those courts, unless there be some law taking his case out of the general rule. It is therefore said to be the right, and if it be the right, it is the duty of the court, to inquire whether this title has been extinguished by an act, the validity of which is recognized by national or municipal law.

If the preceding reasoning be correct, *The Exchange* being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise, that, while necessarily within it, and demeaning herself

in a friendly manner, she should be exempt from the jurisdiction of the country.

If this opinion be correct, there seems to be a necessity for admitting that the fact might be disclosed to the court by the suggestion of the attorney for the United States.

There are a great many facts which cannot properly be called political facts, and at the same time are not justiciable facts.

The facts to which we refer may properly be called diplomatic facts or governmental facts or foreign administrative facts.

There is no jurisdiction over foreign sovereigns in our Courts under our Constitution.

This Court has under Article 3, Section 2, of the Constitution, original jurisdiction "in all cases affecting Ambassadors, other public ministers and consuls" only.

The result is that there are a large number of facts concerning foreign nations that are not justiciable in our Courts because there is no jurisdiction given over them by the Constitution. Of course a foreign sovereign can waive immunity and consent to suit but he cannot be made subject to the process of our courts.

It has been held that the decision of questions of a political nature is exclusively for the Executive and Congress.

The Divina Pastora, 4 Wheat. 52.

The decision of the Executive branch of the Government in respect of such matters is conclusive on the Judicial Department.

Williams v. Suffolk Ins. Co., 13 Pet. 415.

Examples of Political Questions are:

Recognition of States or Nations,

- Jones v. U. S.*, 137 U. S. 202.
U. S. v. Lynde, 11 Wall. 632.
Kennett v. Chambers, 14 How. 38.
Gelston v. Hoyt, 3 Wheat. 246.
Rose v. Himely, 4 Cranch. 241.
The Nueva Anna, 6 Wheat. 52.
U. S. v. Palmer, 3 Wheat. 610.

Accession and conquest of territory.

- Hornsby v. U. S.*, 10 Wall. 224.

Military occupation of subjugated territory.

- Neely v. Henkel*, 180 U. S. 109.

Foreign relations and policy.

- The Nereide*, 9 Cranch. 388.

Claims *v.* foreign government.

- Comegys v. Fasse*, 1 Pet. 193.

Policing of international waters.

- Re Cooper*, 143 U. S. 472.

Adjustment of political boundaries.

- Foster v. Neilson*, 2 Pet. 253.
Garcia v. Lee, 12 Pet. 511.
U. S. v. Arredondo, 6 Pet. 691.

Relations with the Indian tribes.

Cherokee Nation v. Georgia, 5 Pet. 1.

U. S. v. Holliday, 3 Wall. 407.

Cession of territory by state to nation.

Burton v. Williams, 3 Wheat. 529.

Adoption and validity of constitutions.

Luther v. Borden, 7 How. 1.

Political and civil rights of persons.

Georgia v. Stanton, 6 Wall. 50.

Examples of non-justiciable governmental facts are:

The title of foreign government owned vessels, as involved in *The Pesaro* and *The Carlo Poma*.

That a certain act was a governmental act of a foreign Government.

The Adriatic, 253 Fed. 489, aff'd 258 Fed. 902.

The Claveresk, 264 Fed. 276, 280.

Texas Co. v. Hogarth, 265 Fed. 375, aff'd 267 Fed. 1023—the instant case.

Proof as to the status of a governmental commission.

Agency of Canadian Car & Foundry Co. v. American Can Co., 258 Fed. 363, 368.

Doubtless other instances could be added but the above will suffice to indicate the nature of non-justiciable governmental facts.

The fact to which the Ambassador certified in his suggestion was the Governmental nature of an Act of the British Government within its own territory, and since he has so certified the question is not justiciable in our Courts because it is a fact not concerning an Ambassador but a fact concerning a foreign sovereign and a foreign sovereign does not have to submit himself to the jurisdiction.

The case of *South Carolina v. Wesley*, 155 U. S. 542, cited below by appellant, is not an authority to the contrary for the *question involved in the suggestion in that case was justiciable in our courts*. The present question is not so justiciable.

In the case of *The Adriatic*, the requisition of a British steamship by the British Admiralty was made effective at Philadelphia and she was sued for failure to enter on the performance of a voyage charter party. The British Ambassador appeared by counsel as *amicus curiae* both in the Court below and in the Circuit Court of Appeals. In the latter Court he filed a certificate avowing the Governmental nature of the act of the British Government.

Judge Haight said, 258 Fed. at page 903 (Italics ours):

“On principles of international comity, we feel bound to accept the suggestion and avowal of the British Ambassador as conclusively establishing both the fact of the requisition and its governmental character.

“* * * it is apparent that if the vessel was legally requisitioned, no liability attached to the

respondents by reason of the failure of the vessel to thereafter perform the charter, because, upon such a requisition, the charter party, by its express terms, became null and void. But, *in accordance with the rule that 'the courts of one independent government will not sit in judgment on the validity of the acts of another done within its own territory,' it is not within the province of a court of this country to attempt to determine whether the requisition of the vessel was valid or invalid under the laws of Great Britain; it must be accepted as legal; or as it is sometimes expressed, such a question is not justiciable.* *Ricaud v. American Metal Co.*, 246 U. S. 304, 309; *Underhill v. Hernandez*, 163 U. S. 250, 253; *American Banana Co. v. United Fruit Company*, 213 U. S. 347, 357; *Oetjen v. Central Leather Co.*, 246 U. S. 297, 303; *The Invincible*, 2 Gall. 29, 13 Fed. Cases No. 7054; *Hewitt v. Speyer*, 250 Fed. 367 (C. C. A. 2d Cir.); *Earn Line S. S. Co. v. Sutherland S. S. Co.*, 254 Fed. 126 (D. C. S. D. N. Y.) Hence it follows that even if the charter party be construed as libelants must have it construed to raise the question of the validity of the requisition, *no cause of action accrued to them from the failure of the vessel to perform the charter, so far as the courts of this country are at liberty to determine.*"

In the case of *Earn Line Steamship Company v. Sutherland Steamship Company Ltd.*, 264 Fed. 276, and as yet unreported, Judge Hough said of the intervention of the British Embassy and the avowal of a requisition as a governmental act:

"What effect the Court gives to the information so received is a different matter. The friend's

statements, if of evidential value, must, like other evidence, be weighed and tested by legal rule.

"In this instance the substance of the suggestion offered was that the British Embassy avowed as a governmental act on the part of the United Kingdom the requisitioning of the *Claveresk* on or about February 10, 1917, and its continuous retention in government service substantially down to the day of trial.

"The question whether the trial Judge should or should not have received and considered this suggestion is not reviewable; but it may be and has been assigned for error that the court below held the suggestion conclusive evidence of two essential facts, viz: (1) the compulsory nature of the *Claveresk's* service, and (2) the identification of government as the compelling force. While this Court feels no inclination to depart from the rulings of *The Carlo Poma*, 259 F. R. 396, and *Agency, etc., Co. v. American, etc., Co.*, 258 F. R. at 368, holding that a certificate such as this, describing a certain act and avowing it as governmental is to be taken as verity, we do not find it necessary to rest decision on this ground. The evidence in the ordinary sense of that word, *i. e.*, the competent and material testimony of persons duly sworn and papers produced is sufficient for our purposes;—indeed we think this was the course pursued below."

The situation is the same in this case.

The requisition of the *Baron Ogilvy* is established not only by the Embassy avowal, but also by the evidence taken under open commission in England.

(3) *The evidence as to the requisition.*

The Courts below have concurrently found in the respondent's favor on the fact of the requisition as shown by ordinary evidence.

Both Courts below have found on such evidence that the requisition was a governmental act.

Ernest Julian Foley was Assistant Director (Military) to His Majesty's Director of Transports at the time of the requisition of the *Baron Ogilvy*. *Foley*, 235.

The Director of Transports was the head of the department of the British Admiralty, which dealt with all matters of sea transport and requisition under the direction of the Lords Commissioners of the Admiralty, a branch of the executive government exercising the powers of the Crown in respect of naval matters. *Foley*, 235-237.

In accordance with the general practice, Mr. Foley sent a telegram dated April 10, 1915, and reading as follows, 244:

"8/48 O H M S Admiralty, London.

Hogarth, Glasgow. SS *Baron Ogilvy* is requisitioned under Royal Proclamation for Government Service.

TRANSPORTS."

In requisitioning vessels Mr. Foley was acting in behalf of the Lords Commissioners of the Admiralty. *Foley*, 259-260.

The requisition of the *Baron Ogilvy* was made pursuant to a request from the Military Department, for vessels to transport mules, *Foley*, 253-254, and the vessel

was used for this purpose. *Foley*, 249; *Thompson*, 413-419.

If the requisition had not been complied with the vessel would have been taken by force. *Foley*, 245-246, 272.

Mr. Hogarth, the senior member of the firm of Hogarth and Sons, *Hogarth*, 135, testified that on April 10, 1915, he received a telegram from the Admiralty requisitioning the *Baron Ogilvy*. *Hogarth*, 158-159.

He had had previous experience of the course pursued by the Government in requisitioning vessels, *Hogarth*, 160, for six of the twelve vessels of the Hogarth Steamship Company, Limited, of which his firm was manager, had been requisitioned. *Hogarth*, 140. The requisition of the *Baron Ogilvy* was the usual form. *Hogarth*, 160.

The telegram was considered as a formal requisition of the steamer, *Hogarth*, 173, and was confirmed in the subsequent dealings of the parties in respect of the arrangement for the carriage of mules. *Hogarth*, 173.

That it was not confirmed immediately by a letter of requisition was an error in office routine, due to pressure of work of the Admiralty. The failure to send the letter, however, would not have prevented seizure of the steamer for non-compliance with the order contained in the telegram. *Foley*, 245-246, 274.

The failure to send a formal letter of requisition did not, in the opinion of Charles Robertson Dunlop, who was qualified as an expert in respect of the prerogatives and powers of the English Crown, 578-579, affect the validity of the requisition under English law. 221, 294-295, 299, 300-301, 309-314.

In the case of the *Earn Line Steamship Co. v. Sutherland Steamship Co., Ltd.*, the Court, speaking by Judge Hough, dealt with similar facts, as follows:

"The second proposition (that the order was *ultra vires*,—meaning that it was not in accord with English municipal or constitutional law) is equally without support, even though we disregard the multiplied decisions, including our own, regarding the efficacy of the ambassadorial certificate. It is here proven without any reference to that document, that the act commonly called 'requisition' was governmental, and contained or expressed in a letter or order over the signature of the Secretary of the Admiralty. Further, that such letter or order was in assumed compliance with a proclamation dated 3d August, 1914, and an Order in Council dated 10th November, 1915. Whether in exercising this power the officers sending the telegram, signing letters and issuing orders were acting in strict accord with the municipal and constitutional law of the United Kingdom, is a question with which we cannot be concerned; for there is plainly proven a governmental act done within British territory, and we entirely agree with the court below that it is settled law that the act of another sovereign within its own territory is for our purposes legal of necessity. (*Hewitt v. Speyer*, 250 F. R. at 370, and cases cited.) The requisition of the *Claveresk* was a restraint of princes, lawful so far as we are concerned to inquire; * * *."

So here the requisition is proved as a governmental act by evidence given in England quite independently of the Embassy certificate.

(4.) *No act of the owner or its representatives and no failure to act on their part in any way caused or contributed to the requisition.*

Both Courts below have concurrently found in the respondent's favor on this point, but as it is sought to be argued by the petitioner in its brief it will be dealt with again here.

There is not any evidence that the owner preferred to have its vessel requisitioned rather than to carry out the charter party. On the contrary the evidence clearly shows that the owner desired to perform and was prevented from performing solely by the requisition which rendered performance impossible.

The Hogarth Shipping Company was endeavoring to keep its unrequisioned ships away from England, in order, if possible, to avoid further requisitions. *Hogarth*, 180.

The *Baron Ogilvy*, however, was compelled to come to London, in order to discharge cargo. *Thompson*, 400, 401, 432.

There was nothing left undone that could have been done to keep the vessel off requisition. *Hogarth*, 165. It simply could not be avoided for the Government wanted prompt ships. *Foley*, 243, 246-249.

The appellant argues, in effect, that the mule rates under the requisition were so attractive that the appellee made a voluntary arrangement with the British Government to carry mules in total disregard of its contract obligations to the appellant.

This is not the fact.

It is the fact that no arrangement for carriage of mules was made with the government until *after* the requisition had occurred.

It was obviously to the owner's interest to perform the charter with appellant and then to proceed from South Africa to Pagoumene, New Caledonia, for a cargo of ore homeward on his private account. 496.

Mr. Hogarth states that he wished to carry out the charter with the Texas Company rather than to have the vessel requisitioned, for the profit under the charter would have been much greater than the profit under requisition.

In regard to this he testified on direct examination, as follows, 165:

“Q. How would your profits under that charter have compared with the profits that you actually made if you made any while the vessel was under requisition to the Admiralty? A. The profits under the oil charter would be infinitely more than the profits under the requisition.”

The loss is shown more in detail on re-direct examination (Italics ours). 211:

“Q. At the rate you were being paid per for mules by the Admiralty, what did you make per month? A. *A little more than we should have got at the 11s. Blue Book Rate, probably £600 or £700 per month.*

“Q. *As compared with £1,500 to £2,000?* A. Yes, carrying oil the steamer would have loaded 180,000 cases at 2s. per case and, roughly, that is £18,000, *she would have left about £7,000 profit on the oil voyage.*

“Q. And in three months of Admiralty requisition on the terms on which you were what was the profit? A. I can speak more accurately on Blue Book Rates, and this we considered a little better. On Blue Book Rates she would have made £500 a month, but we took a lot of responsibility and trouble in providing muleteers and quarters and we got £100 more.

“Q. Did you make a considerable loss by having the vessel requisitioned? A. A very great loss.

“Q. It is suggested you refrained from taking measures to get the *Baron Ogilvy* free because it was to your interest in some other way, to have her requisitioned. Is there a word of truth that your personal interest or the interest of your company came into the matter at all? A. No.”

The fact that the owners would have had to cover war risks under the charter, whereas the Government bore the war risk under the requisition, was allowed for in the testimony above quoted. *Hogarth*, 213-214.

The libelant in his brief has attempted to refute this evidence by Mr. Hogarth that the carriage of mules under the requisition represented a loss to him as compared with what would have been earned by the carriage of oil under the charter which is the subject matter of this suit.

The difficulty with the appellant's position in this regard is that it is attempting to attack direct evidence by figuring on estimates of its own.

There is not anywhere in the evidence any statement as to the expense for putting in the mule fittings, for

attendance on the mules, fodder, electric-light, wireless telegraphy installation, etc. In other words, the libellant has attempted to create a comparison in which there are a number of unknown elements on both sides. For example, it is not known to how many ports the steamship *Baron Ogilvy* would have been ordered by the Texas Company in the event that she had carried the case oil.

It was provided in the charter that the *Baron Ogilvy* was to have half a cent extra per case on the whole cargo for each additional port and an option was given to discharge it at from one to five ports.

It is not known how many mules died on the voyages of the *Baron Ogilvy* thus causing loss of the gratuity given for mules landed alive.

There is not any definite proof as to what the expenses under the Texas Company charter would have been, nor what the expenses under the Government requisition were.

If, therefore, the gross monthly freight earnable under the Texas Company charter be represented by the letter A, and the expenses under that charter by the letter X, and the gross monthly earnings for the carriage of mules for the Government be indicated by the letter B and the expenses by the letter Y, it follows that, inasmuch as we do not know what the expenses X or the expenses Y amounted to from any evidence which is in the record, the relation between A minus X and B minus Y cannot be known.

Of course, it has already been decided in this Court that the fact that a charterer may earn more out of a requisition than he was earning under a charter party is not material on the question of frustration. *Earn Line*

Steamship Co. vs. Sutherland Steamship Co., Ltd. February 18, 1920.

The purpose of the appellant's argument in the present case in respect of the alleged earnings by the carriage of mules for the Government as compared with the earnings under the Texas Company charter is obviously made as a background for a claim that the requisition was secured by connivance of the owner for its own benefit.

This is clearly shown by the proof, documentary and otherwise, not to have been the fact.

As this claim of connivance has been stressed by the appellant it is necessary to go into the correspondence in some detail to illustrate the soundness of the appellee's position in this regard.

The good faith of the owner of the *Baron Ogilvy* is illustrated by its letter of the 25th of March, 1915, to the Captain. 482-486. In it the owner says, 483-485:

"We have, of course, been greatly disappointed at your being ordered to London as we should have much preferred your going to the Southern French ports and getting out of the submarine area as well as avoiding the very great risk of being requisitioned for Admiralty service. We are very much afraid of this latter, as at present the Admiralty are urgently in need of vessels of your type for their Mediterranean expedition.

"You are declared under an open charter for a cargo of Oil from Port Arthur, Texas, to the Cape ports. The copy of the charter is enclosed herewith, and if you are visited by any Government Officials you can inform them that the vessel is

chartered from the States to the Cape and if necessary exhibit the charter party."

The Captain acknowledges receipt of this letter and the charter party under date of March 28th. 488.

On March 30th, the owner replied to the Captain's letter of March 28, which dealt with various details of his previous voyage and indicated to him again its intention to carry out its South African voyage for the Texas Company, saying, 496:

"Our present intentions are to send you from the Cape Ports to Australia for bunkers and load home under contract from Pagoumene (New Caledonia) to Glasgow."

Captain Thompson confirms the orders that had been given him by the owner as to the voyage for the Texas Company. 403-404. He also testified that he made up his store list for a voyage from Port Arthur where he was to load for the Texas Company. This list, he says, would have been different from the store list out of New Orleans. 437-438.

Under date of March 31st, the owner received a telegram from Messrs. Harley & Company confirming their fears that the vessel might be requisitioned, reading, 498:

"Admiralty Note *Baron Ogilvy* in London may require requisition her. Please post plan. Say when expect discharged."

The owner wrote to Messrs. Harley & Company under date of March 31st, as follows, 499-500:

"We have your telegram of date from which we take it that the Admiralty have apparently

been questioning you regarding this vessel. Please point out to the Admiralty that we have already with the *Baron Jedburgh*, eight vessels on Government service, a larger proportion of our tonnage than we are entitled to give, and that besides, this steamer is chartered for a cargo of oil from the States to the Cape Ports and thereafter from New Caledonia to the U. K. Continent. We cannot say when she is likely to be discharged."

On the 1st of April, 1915, the owner received a letter from a firm called Hogg & Robinson, asking for a ready vessel capable of carrying 4000 to 6000 tons, measurement, of hay, which it was stated the Director of Transports wished for Government service. 501-502.

Under date of April 1st, the owner also got a letter from Messrs. Harley & Company in which the owner's letter to Messrs. Harley & Company of the 31st of March was acknowledged, and in which Harley & Company pointed out that the fact that the steamer was already chartered from the States to the Cape and thence from New Caledonia to the United Kingdom would not be of any concern to the Admiralty if the country needed the steamer. 505-506.

Under date of April 2nd, Hogarth, replied to the letter of April 1st from Hogg & Robinson and suggested that Hogg & Robinson should call the attention of the Director of Transports to the number of vessels which had been requisitioned from the Hogarth fleet and to important contracts which they already had for the carriage of copper ore. 507-508.

Under date of April 2nd, Hogarth wrote to Messrs. Harley & Company advising them that Hogg & Robinson

had been asking information for handy tonnage for the carriage of hay and that they had suggested to Hogg & Robinson that they should call the Director of Transports' attention to the heavy commitments which Messrs. Hogarth had for any handy vessels. 510-511.

Under date of April 3rd, Hogg & Robinson acknowledged Messrs. Hogarth's letter of April 2nd and further urged the Government's requirement for prompt vessels for the carriage of 4000 to 6000 tons of hay. 513.

Under date of April 6th, Hogarth replied to Hogg & Robinson's letter of April 3rd and advised them that it had not any vessels in England, or shortly due there, with the exception of the *Baron Ogilvy* which was then in Milwall Dock, and they added, 515:

"This vessel is, however, chartered to load in the States."

Messrs. Hogg & Robinson replied under date of April 7th that the *Baron Ogilvy* was suitable for the hay requirement, and desired to be kept posted as to her movements, adding that they understood from the Milwall Dock Authorities that she would possibly be clear, that is her cargo would be discharged, by Wednesday following. 518.

On the 9th of April Hogarth received two telegrams from Harley & Company.

The first which was sent at 1.13 p.m. and received in Glasgow at 1.54 p.m., read, 525:

"*Baron Ogilvy*. We regret to inform you Admiralty say must requisition this steamer for Country's need. Telegram of Requisition is being prepared and you will receive same later."

The second telegram was sent from London at 1.45 p.m. and received at Glasgow at 2.16 p.m., reading as follows, 520:

“Baron Ogilvy. Referring to Admiralty Notice Requisition We believe could induce them take her instead for three or four trips New Orleans, Avonmouth or Liverpool, Fourteen pounds namely Thirteen pounds ten and ten shillings gratuity. Shall we try to do so.”

On April 9th, Messrs. Hogarth & Company acknowledged these two telegrams from Messrs. Harley & Company, and, 527, confirmed the telegram they sent in reply to the two telegrams from Messrs. Harley & Company. They wrote as follows (Italics ours):

“We have intimated to Hogg & Robinson that the vessel is committed for further business that probably the requisitioning arrangement which you refer to will be that of another department and it will be as well to make them clear, that the vessel is fixed for oil from the States to the Cape and thereafter from New Caledonia home. Meantime, of course, we have not received a requisitioning telegram and cannot move in the matter.”

Certainly this was a perfectly justifiable position and showed perfect good faith on the part of the owner Hogarth.

On April 9th Messrs. Harley & Company also wrote three letters to Messrs. Hogarth.

In the first of these, 529-531, they stated that they were sorry to advise Messrs. Hogarth that the Admiralty had informed them that the *Baron Ogilvy* was required

for the needs of the country and that a formal telegram of requisition was being prepared which would be received in due course. They expressed regret that the Admiralty had to take the steamer and a belief that the Government would not disturb any steamer's commitments if they could avoid it.

In the second letter they referred again to the notice of requisition by the Admiralty of the *Baron Ogilvy* and said that they believed it would suit the Admiralty's purpose just as well if they were to charter her from New Orleans to Avonmouth or Liverpool for mules at Thirteen pounds ten shillings and ten shillings gratuity for three or four trips, and also stated that they believed if they were authorized to approach the Admiralty they could arrange this use of the vessel. 522-523.

A third letter of April 9th Messrs. Harley & Company, 536-537, acknowledged Hogarth's telegram dealing with the Hogg & Robinson situation and replying to the two telegrams of April 9th received from Harley & Co.

In this letter Messrs. Harley & Company said that they did not know why Messrs. Hogg & Robinson were troubling Messrs. Hogarth, that the department of the Admiralty which Hogg & Robinson followed was quite distinct from the department which Messrs. Harley & Company were following, and added that they understood that the requisitioning of the steamer *Baron Ogilvy* was absolute. They enclosed a copy of the requisition terms. They also stated that they had pointed out to the Admiralty earlier in the day that the steamer was under commitment for other employment, that the Admiralty replied that they could not help that as they required the boat and that any claims that might subsequently

come forward would have to be met in the usual manner. 536-537.

On the 9th of April Messrs. Harley & Company wrote, without any authority from Hogarth, a letter to the Director of Transports referring to his verbal notice of requisition and suggesting that possibly the vessel could be chartered for the conveyance of mules on the same terms as the other *Baron* steamers which were operated in that trade. 532-534.

On April 10th a telegram of requisition was sent from the Admiralty at 8.48 a.m. to the owner, reading as follows, 538:

“S.S. *Baron Ogilvy* is requisitioned under
Royal Proclamation for Government service”
“Transports”

On April 10th Messrs. Hogarth wrote Messrs. Hogg & Robinson, advising them that the vessel had been requisitioned, that she was the *ninth* vessel of their small fleet then on Government service, and hoped that the Admiralty would see fit to leave the rest of their fleet alone as they did not know of any firm of tramp shipowners with the same proportion of vessels on Government service as they had. 540-541.

Under date of the 10th of April, Messrs. Harley & Company wrote to Messrs. Hogarth & Company dealing generally with the situation and explaining how Messrs. Hogg & Robinson had been injected into it. They added, 544 (*Italics ours*):

“You will now have received a formal telegram
from the Admiralty requisitioning this steamer

under Royal Proclamation for Government Service.

"The Admiralty have also sent us a similar telegram.

"As they had not sent this message off last evening when we saw them *they could not proceed to discuss the alternative suggestion that we have in hand*, but we are seeing them at noon today and will advise you further."

This clearly indicates not only that the Admiralty insisted on requisitioning the vessel first and then negotiating as to trades afterwards but also that there was not any arrangement made with regard to the carriage of mules until *after* the vessel had been taken by the Government under requisition and that then, as the District Court suggests, the owner proceeded quite properly to arrange to make as good a freight as they could out of the Government business.

This arrangement was subsequently consummated through Messrs. Harley & Company in a series of letters and telegrams. 546-560, 572-578.

The testimony of Mr. Foley, of the Admiralty, confirms the facts of the situation as it has been above outlined.

He testified, 242-243 (Italics ours):

"Q. Before the date when the vessel was actually requisitioned had you any request from the owners or Messrs. Harley that she should not be taken?

(Question objected to.)

A. We had.

Q. What treatment, in effect, did this question receive? A. We did as we did with everybody; we

listened to what they had to say and did our best to avoid hardship, but *we needed the ships, we needed the prompt ships, we needed the suitable ships, and therefore we took them.*

Q. In those circumstances was it found essential to requisition the *Baron Ogilvy*? A. Yes. This ship was particularly suitable for our services; *we wanted her for the carriage of mules.*"

Again, 270-273, he testified. (Italics ours):

"Q. Was not this a case in which it was happily possible for the parties to mutually agree upon the terms of engagement? A. No, not from my point of view, the reason being that we were dealing with a very large number of ships and you probably know that negotiations to arrive at a rate to be agreed between two people are a lengthy and troublesome process; there was no possibility of doing it.

Q. You had already, in the case of other ships belonging to this same line, arrived at certain conditions upon which they were being worked? A. Quite.

Q. And in respect of this ship you were able to agree that the same conditions should apply? A. Quite.

Q. It was not, therefore, either difficult or a lengthy business to come to a mutual agreement as to the terms of engagement with regard to this particular vessel? A. *It was not a difficult or lengthy business when I had requisitioned her, but to conclude a bargain with them on the basis of a free ship would have been a difficult and lengthy business. I could not have done it; the ship had a charter she could not break. It was impossible for myself and the owners to come to an agree-*

ment for the use of that ship. *I had to take the ship by the exercise of the Crown's powers. Quite obviously there was no question of discussing terms with the owner; he had a prior engagement for the ship.*

Q. Had you not, as a matter of fact, given some intimation to Messrs. Harley before the 10th April that you would probably be requiring this vessel?
A. Yes, I think we had.

Q. Before the 9th April? A. I think so; our need was very well known; our whole purpose of getting the particulars of those ships was that we should be up to date in their position and so forth.

Q. Had you not made it plain to them that if this vessel was not chartered to you on the terms on which you were already employing the other vessels of this line, you would have to requisition her? A. *Certainly not. May I point out again there is no question of charter; the owners could not charter the ship to us. They had a charter for the ship."*

And again, 279-283, he testified. (Italics ours):

"Q. Just to get the sequence of events, about this 9th and 10th April, it would rather appear—tell me if I am right—that on or before the 9th April you had verbally requisitioned the *Baron Ogilvy*. Would you look at the first letter to which my friend referred? A. 'With reference to your verbal notice of requisitioning this steamer.' *We told Messrs. Harley obviously that we were going to take that steamer.* The actual telegram sent on the 10th I think was at 8.18 A.M., very early, so the decision was come to on the 9th. As Harley was in constant attendance at our office, he would have been told on the 9th.

Q. Then there was an arrangement made as to the terms upon which the vessel should run for the government? A. Quite.

Q. It is referred to there as chartering her? A. Yes.

Q. You were one of the parties to that arrangement? A. Yes, I was.

Q. Was that, in your view, a voluntary charter of the vessel by the owners to the Director of Transports? A. Not voluntary in any sense except this, that he was not bound *after the ship was requisitioned* to accept these conditions as to giving up fittings and attendants, and forage and so forth.

Q. In other words, you had a right, as you told us, by the prerogative of the Crown to requisition a ship? A. Which I exercised.

Q. But had you any right to require the owner to alter her or put up fittings? A. I had no right to do that.

Q. As I understand, for the carriage of the mules, that would have to be done by the Admiralty? A. That would have to be done by the Admiralty.

Q. And it suited you to have that done by the owners instead? A. It suited me to pay Hogarths, as my agents, to do it.

Q. Supposing you had not come to an arrangement as to the terms on which this vessel was to run on these mule trips, what could have happened; would Hogarths have had his vessel free? A. No, *I should have taken the ship, had her fitted myself, and he would have been paid the Blue Book rate of hire and nothing more, in addition to which there might have been his liability for punishment.*

Q. I dare say they have heard in the States, as we have here, of what we call in this country Hobson's choice? A. Yes.

Q. Would it be right or wrong to suggest that with regard to this ship, so far as Messrs. Hogarths were concerned, it was rather a case of Hobson's choice? A. It was entirely a case of Hobson's choice."

Mr. Hogarth also testified as to his desire to carry out the Texas Company contract. *Hogarth*, 141-142.

Judge Hough, therefore, dealt with the situation below entirely correctly when he said, 705-706:

"As matter of law, respondents were not bound to use effort to prevent requisition, *i. e.*, to shift the burden to some other ship owners' shoulders in the interest of either themselves or libellants; and it was entirely within their right to seek (when governmental use was certain) the carriage of mules instead of something else, if mules promised less loss than other probable freight. This they did—nothing more."

It is submitted that the owners' attitude was unexceptionable throughout and that with his ship in London—in the Lion's mouth, as it were,—a clearer case of Governmental *vis major* against them can with difficulty be imagined.

We can leave it with the remarks of Mr. Foley who knew all about the situation and who aptly said, on cross examination when questioned about the negotiations for the carriage of mules. 265-268:

"Q. Do you still say, in the light of the language used in those three letters, and in that tele-

gram that this vessel was not chartered to you by her owners? A. Surely the question is, what exactly you mean by chartered? *If you mean I made an agreement with the owners after the requisition, certainly, but if you mean the owners chartered to me freely in the market sense of the term chartered, but that they had a free boat that they offered at the market rate, and I took it, no, nothing of the sort.*

Q. Is not that what happened, that you sent to the owners the telegram of the 10th April, and the owners under the pressure of that telegram offered to charter the vessel to you, and you accepted the offer? A. It is rather difficult to answer the question, you put it rather curiously, if I may say so; *I requisitioned the ship and afterwards the owners and myself agreed to a certain basis of payment; that is really the way it is in my mind.*

Q. That is your view of the transaction? A. That is my view of the transaction.

Q. You would not say that the language employed in the letters was inaccurate? A. No, because after the requisitioning telegram went a certain offer was made to us, and we accepted it, *but all this is the sequence of the requisitioning of the ship.*

Q. Is not this just one of these instances in which the shipowner has bargained with you on the basis that you had the big stick? A. No, the point is the shipowner has his ship taken from him; then all he can do as a prudent shipowner is to make the best he can of it with us. *I had something I wanted from him outside the ordinary requisition and it suited him to take that line.*

Q. The result of the arrangement was that you obtained something from him you would not have

obtained if the vessel had been requisitioned in the ordinary way? A. Quite, that is so."

(5) *After notice of requisition the owner was not under any duty to try to resist the requisition or to get the vessel released.*

The vessel was taken under an undoubted war power of a Sovereign Government. This being so, it can hardly be contended that because of private contract with a foreigner the British owners were under legal obligation actively to oppose their Sovereign in order to carry out their private contract.

In the case of *Earn Steamship Company v. Sutherland Steamship Company, Limited*, 254 Fed. 127, the question involved the requisition of a vessel under a time charter, where the profits to the owners were greater under the requisition than under the charter. In dealing with a criticism by charterers of the owners' compliance with the telegram of requisition, Judge Learned Hand, in 254 Fed. at p. 129 said:

"Nor am I impressed with the suggestion that the formal requisition followed the original telegram only because of the respondents' compliance in its telegraphic answer. It appears to me somewhat naive to suppose under such circumstances as then existed that the British Admiralty made requisitions dependent upon the consent of the ship owner. That the respondents were eager enough to have their ship taken is clear enough, as well as is their desire to get rid of a charter then become onerous and to substitute the Admiralty hire, but

that this attitude of his had any effect upon the result seems to me a thin supposition."

Upon appeal of that case the Circuit Court of Appeals for the Second Circuit, in an opinion by Judge Hough, discussed the possibility of resistance by an owner to the requisition of a vessel, and said in part:

"Thus the question is reached whether in obeying the order, Sutherland yielded to that restraint of princes excepted in the charter party.

"It is here to be noted that the charter was not a demise. Subject to the chartered right of Earn Line, the ship-master was the owner's master, and the ship, through that master, in the owner's possession. (*The Santona*, 152 F. R. at 518). Therefore in legal contemplation the vessel was taken or received from the owner and not from the charterer.

"On the question last stated appellant offers two propositions: (1st) The clause refers merely to physical restraint of the ship; an order to the owner is not within its meaning. (2d) The order was "*ultra vires*";—meaning that it was not in accord with English municipal or constitutional law.

"The first proposition is untenable. In times past, when a vessel left port, she disappeared from her owner's ken; there was no means of communicating with her except by other ships like her, and electricity and steam did not keep owner and ship in constant touch. In such times force, governmental or other, was more swiftly and more usefully exerted on the ship than on the owner. Now it is more efficacious to act on the ship through the owner, and (so to speak) requisition or command-

deer the owner, and through him his vessel; putting upon that owner the same necessity of obedience that in former days was exercised on the master wherever the ship might be. The theory has not changed, but the method of application has been modernized. The fundamental essential of a restraint of rulers is that the restraining act should be governmental (*Northern etc., Co. v. American, etc., Co.*, 195 U. S. at 467 *et seq.*). That the restraint need not be physical was in effect held in *The Styria*, 186 U. S. at 18; and see cases cited in *The Athanasios*, 228 F. R. 558. The matter is fully covered by Lord Reading in *Sanday v. British, etc., Co.*, 2 K. B. (1915) at 802; in which case, on appeal to the House of Lords, it was said (in affirming the judgment) that "the circumstance that force was neither exerted nor present (is immaterial) for force is in reserve behind every state demand"; and it was added in substance that it would be "a strange law" which required one to resist "till the hand of power was laid upon him, an order which it was his duty to obey. If it were an order which he was not bound to obey and which he might have successfully resisted either by violence or by process of law, a question might arise. * * *

"The evidence here is plain that resistance was impossible; all that Sutherland could have done would have been to say 'I refuse to order my captain to report to the Admiralty agents; I prefer to leave my ship in the service of a neutral charterer.' The supposed case need not be pursued;—to the probable and proper punishment of such an act. *No citizen or subject is by lawful private contract either required to or justified in proceeding to such lengths in resisting or evading the compulsion of his government.*"

A disregard of the requisition when the vessel was in London to the extent of attempting to send the vessel to Port Arthur in defiance of the requisition would not have been beneficial to the charterer, because the vessel would have been taken in any event. *Foley*, 246.

Incidentally there can be little doubt but that the owner would also have been subject to heavy penalties and possibly the loss of all remuneration for the use of its ship.

In *Gans Steamship Line v. the British Steamship Frankmere*, 262 Fed. 819, a similar question came up for decision in the United States District Court for the Eastern District of Virginia. In that case the vessel was at Genoa when requisitioned. The compensation received from the Government under the requisition of a time chartered ship was greater than that which would have been received under the time charter in force at the time of the requisition. Consequently, the owners got paid more under the requisition. Judge Waddill sustained the requisition as an exercise of Governmental *vis major*.

Concerning the efforts made in this instance to prevent requisition or secure the vessel's release therefrom, Mr. Foley testifies as follows, 246, 249:

“Q. I do not know whether any representation in fact was made to you by either the owners or Messrs. Harley & Company, their agents, after you had requisitioned her in the way you have stated, to have her released?

(Question objected to.)

“A. That is very difficult to say. I had constant interviews with Messrs. Hogarth and Messrs.

Harley in which they pressed for the release of steamers. It was at that time a constant plea from all ship owners, and Messrs. Hogarth were not less persistent than others.

“Q. Having regard to the nature of the employment which if the vessel had not been requisitioned she was about to take up, that is to say the carrying of oil from Texas to Cape ports, would a request by the owners or Messrs. Harley & Co. for her release have resulted in her being released?

A. Certainly not.

“Q. Was the carriage of a cargo of oil from Texas to Great Britain regarded by the Transport Department as being in the interest of the British Empire at war? A. I can hardly answer that. What happened was that it was not considered anything like so requisite as the carriage of mules from the United States to this country for the purposes of war. The carriage of oil to the Cape was of importance, but it was not comparable with the carriage of mules to this country, that is to say, military importance.”

The argument that it was unfair of the Government to requisition more of the Hogarth steamers because they had already requisitioned such a large number, was frequently brought to the attention of the Admiralty. *Hogarth*, 188.

In cases of the requisition of the *Baron Farborough* and the *Baron Kelvin*, which were released from requisition, were under charter to carry pyrites, a cargo which was of prime importance to the Government. *Hogarth*, 189-190. The carriage of petroleum to South

African ports by the *Baron Ogilvy* did not furnish a similarly cogent argument for her release.

In this regard Mr. Hogarth testified, 189-191:

“Q. Now, I suggest that you might have taken up this matter of the *Baron Ogilvy* much more energetically if you had been really anxious to discharge this contract. Is it your statement that you could have done more than is represented by these few letters? A. Nothing more, in my opinion, would have had any effect. I had no argument with which to go to them. It was not the government interest to carry a cargo of oil, whereas it was very much to the government interest that we should go on carrying cargoes of pyrites to this country.”

and again 210-211:

“Q. Have you had experience of endeavoring to get vessels released by the Admiralty? A. Yes.

“Q. Have you considered you had any argument worth putting forward to the Admiralty in respect of the *Baron Ogilvy* to get her released? A. No, I considered I had no argument; I could not plead it was in the national interest that a cargo of oil should be carried from the States to the Cape.”

Mr. Foley testified to the same effect, *Foley*, 248:

“Q. Was the carriage of a cargo of oil from Texas to Great Britain regarded by the Transport Department as being in the interests of the British Empire at war? A. I can hardly answer that. What happened was that it was not considered anything like so requisite as the carriage of mules

from the United States to this country for the purposes of war. The carriage of oil to the Cape was of importance, but it was not comparable with the carriage of mules to this country, that is to say, military importance."

(6.) *The effect of the Act of the British Government was to frustrate the charter party which is the subject matter of this suit and to discharge both parties thereto from all further obligations thereunder.*

Under the provisions of Clause 8 of the charter party, the lay days for loading were not to commence before April 15, 1915, and if the vessel was not ready to load by 2 p.m. on May 15, 1915, the charterers had the option of cancelling. 456-457.

In other words, this was a charter party for vessel's delivery in April-May, 1915, at Port Arthur and for a voyage immediately thereafter to South Africa. It is shown by the evidence that the Texas Company had commitments for the carriage of the cargo which they contemplated sending by the *Baron Ogilvy*. They subsequently lifted the cargo on the *Vimeira*, which was chartered April 14, 1915, to carry the cargo in question. 104, 445.

It is interesting to note that the *Vimeira* charter also was for loading *between April 15 and May 15, 1915.* 445.

It is an uncontroverted fact that the steamship *Baron Ogilvy* did not get out of Government service until October 20, 1915. *Embassy Certificate*, 131; *Foley*, 253.

Thus the requisition of the vessel occupied many months more than the voyage under the charter of the

Texas Company would have occupied and the commercial use of the vessel during the period when the charter of the Texas Company would have been performed was rendered entirely impossible by the act of the British Government.

At the time of the requisition, therefore, the release of the vessel during the period when the Texas Company charter under ordinary course would have fallen to be performed was not expectable. The owner took this position at once in communicating with the Texas Company and advised the Texas Company under date of April 12th of the fact that the vessel had been requisitioned and would not be able to carry out her charter. 102-103.

The intimation contained in the libelant's brief that the requisition might have been only for a few weeks is entirely misleading because the suggestion of a short requisition was involved in a letter from Hogg & Robinson regarding a requisition for service in the carriage of hay, 502, whereas what the Government really wished the vessel for was the carriage of mules, and that was the trade for which she actually was used. Prompt ships were urgently needed, the *Baron Ogilvy* was a prompt ship and the Government took her irrespective of her private commitments. *Foley*, 242-243.

The Admiralty used the *Baron Ogilvy* for trade from New Orleans to Avonmouth, which was an entirely different trade from the trade which was contemplated in the Texas Company charter namely from Port Arthur to South Africa.

A more perfect case of the frustration of a venture by *vis major* would be difficult to find.

Great emphasis is, apparently, placed by the appellant on the fact that the charter party in the present case did not contain the usual restraint of princes exemption.

But an exception has not anything whatever to do with the doctrine of frustration.

An exception may be an excuse for the temporary non-performance of a contract which is in existence, but the frustration of a contract means that the contract is entirely destroyed by some supervening occurrence rendering it impossible of performance.

In the present case, the contract was entirely destroyed because the requisition was the interference of a *vis major* and the period of requisition was indefinite; thereby the subject-matter of the contract, *i. e.*, the use of the *Baron Ogilvy* for a voyage from Port Arthur to South Africa commencing April-May, 1915, was rendered wholly impossible. *Embassy Certificate*, 130; *Requisition Telegram*, 538.

Annexed to this brief is an appendix which contains a list of cases dealing with the frustration of charter parties and other contracts.

We shall now discuss some of these cases which seem peculiarly to apply to the situation in the present case.

The decision of the Supreme Court of the United States in the case of the *Allanwilde Transport Company*

v. *Vacuum Oil Company*, 248 U. S. 377 (1919) is a flat decision supporting Judge Hough's decision in the present case.

In that case the *Allanwilde*, a sailing vessel, loaded at New York for Rochefort, France, a port in the war zone, and sailed September 11, 1917. Her charter party did not contain any exemption of restraint of princes.

On September 28th, while the vessel was at sea, unknown to the Master, a Government ruling became effective, preventing the clearance of sailing vessels bound for the war zone.

Owing to severe weather the vessel was compelled to put into New York for repairs, after which she was prevented from continuing her voyage by the Government ruling.

The Circuit Court of Appeals for the Third Circuit certified the following questions to the Supreme Court:

"(1) Was the adventure frustrated and was the contract evidenced by the charter party and by the bill of lading issued to the oil company, dissolved so as to relieve the carrier from further obligation to carry oil?

"(2) Whatever answer may be given to the first question, did the contract thus evidenced justify the carrier under the facts stated in refusing to refund the prepaid freight?"

The Supreme Court answered both questions in the affirmative.

In delivering the Court's opinion, Mr. Justice McKenna said at pages 385-6 (Italics ours):

"It is urged, however, that there is no provision in the contract (charter party and bill of

lading) of the Oil Company excepting 'restraint of princes, rulers and peoples' and that, therefore, the carrier was not relieved from its obligation by the refusal of clearance to sailing vessels. *And it is further urged that such embargo was at most but a temporary impediment and the cargo should have been retained until the impediment was removed or transported in a vessel not subject to it. We cannot concur in either contention. The duration was of indefinite extent. Necessarily, the embargo would be continued as long as the cause of its imposition—that is, the submarine menace—and that, as far as then could be inferred, would be the duration of the war, of which there could be no estimate or reliable speculation. The condition was, therefore, so far permanent as naturally and justifiably to determine business judgment and action depending upon it. The Kronprinzessin Cecilie, 244 U. S. 12."*

That the doctrine of frustration is not affected by the presence or absence of exceptions is also shown in the case of *Shipton-Anderson & Co. v. Harrison Brothers Co.*, 21 Com. Cas. 138 (1915).

In that case the sellers sold to the buyers by a contract dated September 2, 1914, about 42,800 centals of winter wheat ex S. S. *Dalecrest*, ex grain storage, payment cash within seven days against transfer order.

There were not any exceptions in the contract.

At the time when the contract was made the sellers were the owners of a parcel of 42,800 centals of winter wheat which had been discharged out of the steamer named and was then lying in a grain warehouse. No transfer order was given.

On September 4th the sellers were verbally informed that the wheat had been requisitioned by the British Government and on September 8th a written requisition was sent them. The buyers claimed damages from the sellers for non-delivery. Arbitration ensued in pursuance of the rules of the Liverpool Corn Trade Association and the arbitrators referred certain questions in the case to the Court of Kings Bench in pursuance of the provisions of the British Arbitration Act.

The Court held that inasmuch as the delivery of the wheat by the sellers to the buyers had been rendered impossible by the requisition, the sellers were excused from performance of the contract in spite of the fact that the contract did not contain any exception.

The case was heard by Lord Reading, Mr. Justice Darling and Mr. Justice Lush.

After determining that title had not passed to the buyers by reason of the fact that there had not been any delivery of warehouse certificates, Lord Reading proceeded to discuss whether the sellers were excused from performance of the contract owing to the requisition, and called attention to the fact that the contract was absolute in its terms, and then said, at page 141:

"No doubt there are cases on either side of the line, and the application of the principles of law are matters of some nicety and difficulty, but we have come to the conclusion that in this case the sellers are excused from performance of the contract, and that the contract must be taken as an undertaking by the sellers to deliver the good subject to the condition, that if the British Government requisition the goods and render it im-

possible for the sellers to perform their contract they should be excused from the performance of it. The conclusion at which I have arrived is, I think, supported by the decision in *Nickoll & Knight v. Ashton, Edridge & Co.* [6 Com. Cas. 150, 152; (1901) 2 K. B. 126, 132; 70 L. J. K. B. 600, 603], and also by the decision in *Baily v. De Crespigny*, [(1869) L. R. 4 Q. B. 180, 186; 38 L. J. Q. B. 98, 102]. The particular passage in *Nickoll & Knight v. Ashton, Edridge & Co.* upon which reliance is placed by Mr. Raeburn on behalf of the sellers is in the judgment of A. L. Smith, M. R., where he quotes from the judgment of Blackburn, J., in *Taylor v. Caldwell* [(1863) 3 B. & S. 826 at p. 833; 32 L. J. Q. B. 164, 166], laying down a rule as to the construction of certain contracts, which rule is as follows: 'Where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.' It is to be observed that in that rule stress is laid upon the perishing of the thing which was the foundation of the contract before breach. The principle of the case seems to me equally applicable to that now under consideration

where by reason of the lawful act of the executive the thing, in a sense, has perished. Certainly through the act of the British Government it is no longer in the power of the sellers to perform their contract. * * *

“It must, however, be clearly understood that we are not by this decision in answer to the questions put to us deciding that if the sale had not been of specific goods that the sellers would have been excused; but it is because the sale was a sale of specific goods and was therefore rendered impossible of performance when the goods were lawfully requisitioned by the British Government that I come to the conclusion that the sellers are excused.”

Mr. Justice Lush dealt with the whole question very neatly at page 143, as follows:

“Whenever it is necessary to consider, as it is in this case, whether a supervening impossibility of performance excuses the contracting party, one must of necessity consider what the nature of the impossibility is, and what has given rise to it. Willes, J., in *Clifford (Lord) v. Watts* [(1870) L. R. 5 C. P. 577, 586; 40 L. J. C. P. 36] stated the principle in this precise way: ‘Where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and hath no remedy over, there the law will excuse him.’ In this case the impossibility which supervened after the making of the contract was an impossibility created by an act of State. The moment these goods were requisitioned it became the duty of the vendors to comply with the requisition, and an act of State made it contrary to the duty of the

vendors to carry out the contract to the buyers. The case therefore clearly falls within the principle that has been so often acted upon that the vendors are excused from performance of their contract where it is impossible for them legally to perform their obligation owing to an act of State and not through any default on their part. The vendors here have committed no breach of their contract, and I think that the question put by the arbitrators should be answered in the way indicated by my Lord."

In *Nickoll v. Ashton* (1901) 2 K. B. D. 126, where the defendant had sold a cargo of cotton seed to be shipped on the steamship *Orlando* in January, when owing to a stranding of the *Orlando*, without any fault on the seller's part, she was unable to carry the cargo, it was held that the contract was frustrated.

In *Taylor v. Caldwell* (1863), 3 B. & S. 826, the lease of a music-hall was held to be frustrated by the destruction of the hall by fire.

In *Appleby v. Meyers* (1867) L. R. 2 C. P. 65, there was a contract to supply and instal machinery in a building. After partial instalment, the premises and the machinery were destroyed by fire, and Mr. Justice Blackburn held that both parties were excused from further performance.

In *Metropolitan Water Board v. Dick, Kerr & Co.* (1917) 2 K. B. 1; (1918) Appeal Cases 128, there was a contract for the construction of a reservoir in 1914. In 1916 the Ministry of Munitions, under the Defense of the Realm Act, ordered the defendants to stop work and to sell such material as it had on hand to munition factories.

This governmental act was held by the House of Lords to have terminated the contract.

In *Marks Realty Co. v. Hotel Hermitage Co.*, 170 App. Div., 485 (N. Y.) the defendant agreed to pay for an advertisement of its business in a "souvenir and program" of a certain national yacht race, when the program should be published. The race was cancelled, owing to the European War.

It was held that since the holding of the race was of the essence of the contract, defendant was excused from performance.

The Court said at page 485:

"This is not where a promisor has failed to guard himself against a *vis major*. It is not a performance on one side, the other having no appropriate clause to excuse default. But it is where the situation, as it turns out, has frustrated the entire design on which is grounded the promise. An advance issue of the programs cannot fairly be held to be what defendant was to pay for. The object in mutual contemplation having failed, plaintiff cannot exact the stipulated payment."

In *Southern Railway Co. v. Wallace* (1911) 175 Ala., 72, 56 So. Rep., 714, it was held that quarantine regulations made subsequent to the contract, preventing the shipment of cattle, excused performance.

In *Gesualdi v. Personeni* (1911), 128 N. Y. Sup. 683, performance of the contract for the sale of patent medicines was excused upon the sale becoming illegal by subsequent government regulations adopted under the Federal Pure Food Law.

In *Hildreth v. Buell* (1854), 18 Barb., 107, failure to perform an agreement to furnish iron for locks in a canal being constructed was excused on account of the subsequent act of the legislature suspending the work.

In *Stewart v. Stone*, 124 N. Y., 500, it was held that the performance of a contract to manufacture cheese and butter, market the same and deposit the proceeds to the credit of the plaintiff who delivered milk for that purpose, was excused by the destruction of the factory by fire.

The doctrine of frustration of commercial contracts is an outgrowth of the fact that time is of the essence in such contracts.

Situations constantly arise in which it is necessary that the parties should immediately know what their respective rights are.

When a charterer has made a voyage charter for the carriage of cargo, and has his commitment to the cargo owner to fulfill and when, as here happened, the vessel which he has chartered is prevented from performing the charter party, whatever may be the cause of that prevention, his first instinct and necessity is to secure another vessel to carry the cargo for which he is committed. That is exactly what was done in the present case when the Texas Company, on April 14th, evidently as soon as possible after the requisition, chartered the steamship *Vimeira* to lift the oil cargo which they expected to ship by the *Baron Ogilvy*. 104.

The fact that time is of the essence in these matters is shown by the universal custom of having every charter

party contain the so-called cancelling clause—such as the clause in the charter of the *Baron Ogilvy*, 456, 457,—providing that the vessel must arrive at a loading or discharging port on or before a certain date, failing which the charterer has the option of calling the contract off.

When a situation arises, such as arose in this case, it is of the essence of commercial law that the parties should know just what their rights are at the time when the trouble occurs.

The charterer must know that he is not in danger of having the chartered vessel cast back on his hands with a demand for performance on his part, and that he may safely go about to arrange other commitments.

The owner, on his side, ought to know whether in case the Government should suddenly change its mind, he would be free to deal with his vessel as he likes.

Suppose in the present case, for example, that suddenly the Government had changed its plan about using the *Baron Ogilvy* and had freed the vessel, say, about the 15th or 20th of April and she had proceeded to Port Arthur and arrived there before May 15th and demanded a cargo of oil from the Texas Company. The situation would then have been that the Texas Company would have had both the *Vimeira* and the *Baron Ogilvy* on its hands with, so far as appears, only one cargo with which to load them. It is not difficult to fancy the attitude which the Texas Company would have taken if such a thing had occurred. They, undoubtedly, would have said that the matter was all off when the *Baron Ogilvy* was requisitioned by the British Admiralty, and that the owner could not come back after the Texas Company had

got another vessel for the cargo intended for the *Baron Ogilvy* and demand a second cargo. The owner would have had his trip to Port Arthur in vain.

It is to guard against the possibility of just such situations as this that the doctrine of frustration has arisen and is a necessity in commercial law because parties must know their rights at once in order to feel safe in going ahead and making other arrangements when the subject matter of one of their contracts has failed.

It is submitted, that this is the only conceivable, workable commercial theory to be applied when something happens by operation of *vis major*, without fault of either party, which renders it certain that a vessel which has been engaged under a charter party cannot perform her contract.

The result would not have been any different in the present case if the *Baron Ogilvy* had been sunk, without her owners' fault, so that it was obvious she could not be raised in time to perform her contract, or if without her owners' fault she had been so badly burned that it was obvious she could not have been repaired in time to perform her contract. She was, as Judge Hough suggested, as entirely removed so far as the performance of the Texas Company contract was concerned, as if she had been destroyed. 708-709.

It is well settled that in commercial matters a contract for April shipment or delivery is not satisfied by a shipment or delivery in August or September, and so in charter parties a charter under which a vessel is to be delivered in April or May is quite a different charter from a commercial standpoint than a charter in which the vessel is to be delivered in October or November.

In other words, what is contracted for by a charter such as that of the Baron Ogilvy is the commercial service of the vessel to the charterer for a voyage commencing at the port of loading at the time named. Dorrance v. Barber, 262 Fed. 489 (1919); Connell &c. Co. v. Diederichsen & Co., 213 Fed. 737; Bowes v. Shand, 2 App. Cas. 455.

A voyage which would commence in October or November is not the same voyage in a commercial sense, although the port of loading and destination might be the same.

It is perfectly clear, therefore, that the fact that the requisition rendered the intended commercial voyage absolutely impossible of performance, and put an end to the charter party, excused both parties from any liability in damages.

This is the principle underlying the decision of the Circuit Court of Appeals for the Second Circuit in the case of *Lewis v. Mowinkel*, 215 Fed. 710 (1914), affirming a decision by Judge Ward, in which a libel was filed by the charterer of the steamship *Moldegaard* to recover damages from her owner for failure to perform a charter party dated September 16, 1911. The charter was for about one year, beginning from the time of her delivery to the charterer, upon the completion of a charter to the Munson Steamship Line, which was then being performed. The flat period of the Munson charter expired January 7, 1912. While under the Munson charter the *Moldegaard* stranded on one of the Bahama Islands, was given up as lost, finally was salvaged, and was again ready for service in February, 1913.

This Court emphasized the fact that the parties when they were entering into a charter could not be interpreted to have intended a charter which began more than a year after the expiration of the Munson charter on January 7, 1912, and said, at page 711:

“We agree with the District Court in thinking that the stranding of the steamer, in such circumstances as to induce her owners to believe that she would become a total loss and in any event to make her employment impossible for many months, released them from liability under the charter. It excused both parties, but did not make a new contract.”

The same point is emphasized in the opinions of the House of Lords in the case of *Bank Line, Ltd. vs. Arthur Capel & Co.* (1918), 35 T. L. R. 150.

In that case a steamship, the *Quito*, was chartered from her owners by a charter party dated February 16, 1915, with delivery date not before April 1st or after April 30th. The charterers did not cancel, although the vessel was not ready by the cancelling date, and whilst the vessel was preparing for service under the charter she was requisitioned by the British Admiralty for an indefinite period.

In August, 1915, the owners received an offer from third parties for the purchase of the vessel provided they could get her released from the requisition. They succeeded in getting her released by substituting another vessel belonging to them. The next day the charterers called on the owners to deliver the vessel under the charter. The owners contended that the charter had been

frustrated by the requisition and in an action by the charterers against the owners for a declaration that the charter had not been frustrated, the House of Lords held that it had been frustrated and that the requisition ended all rights between the parties and left the owners free to sell the vessel as they had done.

The Lord Chancellor, Lord Finlay, said, 35 T. L. R. at page 152:

“The charter was to be for 12 months from delivery, which the owners were to make by the end of April unless prevented by unforeseen circumstances, in which case the charterers had the option of cancelling, however short the delay. If, owing to unforeseen circumstances, it became impossible for the owners to deliver under the charterparty until many months after the end of April, the whole character of the adventure would be changed. A charter for 12 months from April was clearly very different from a charter for 12 months from September. In such a case the adventure contemplated by the charter was entirely frustrated, and the owner when required to enter into a charter so different from that for which he had contracted was entitled to say ‘*non hanc in foedera veni*.’”

Lord Sumner, who is generally considered by the English bar as the best commercial Judge in England at the present time, said at page 153:

“What then was the nature of the charter? It was not in form an April to April charter but it was sufficiently so in substance. If the ship had been placed at the disposal of the charterers when released by the Admiralty, she would virtually

have been in their hands for a September to September hiring. The mere change in the initial month of the actual hiring was not quite the point, for this was not the old comparison of a summer with a winter voyage. In either case she would have been on hire for each month of the twelve and the exact cycle of the seasons would make little difference to her. What was important was this. During all the months of the *Quito's* service for the Admiralty the charterers would not in the least know when, if ever, they would have her on their hands. They could not tell whether they might suddenly have to find employment for her, or whether they must make provision for the current necessities of their trade without counting upon her at all. In one respect they would be at an undubitable disadvantage. The postponement of the beginning of her hire at any rate brought nearer the end of the war, after which the charterers would have to pay war rates for the ship and only have the use of her in peace employment. In the latter respect the owners' position also would be one of indecision, for their business was one that required that they should look ahead and in doing so they could not tell when, if at all, they were to have the *Quito* once more on offer. These uncertainties in commerce were very serious. Lord Justice Scrutton asked himself if the September to September employment would be in substance the same employment as that from April to April. He (Lord Sumner) agreed with him that it would not, and he thought that the uncertainties of the intervening period in time of war both emphasized the difference between the two and added to the gravity of the lapse of time taken by itself."

Later on, in his opinion, Lord Sumner adopted, as the best definition of a frustration which results in the dissolution of a commercial contract, a remark of Lord Dunedin in *Metropolitan Water Board v. Dick, Kerr & Co.*, 1918 A. C., at page 128, which was :

“An interruption may be so long as to destroy the identity of the work or service, when resumed, with the work or service when interrupted.”

At page 156, after discussing other definitions and the nature of frustration, Lord Sumner said (italics ours) :

“For his own part he inclined to prefer the expression already quoted from his noble and learned friend Lord Dunedin, and substantially adopted by Lord Justice Scrutton in the Court of Appeal.

“Applying these considerations, he was of opinion that the requisitioning of the Quito destroyed the identity of the chartered service, and made the charter, as a matter of business, a totally different thing. It hung up the performance for a time, which was wholly indefinite and probably long. The return of the ship depended on considerations beyond the ken or control of either party. Both thought its result was to terminate their contractual relation, and as they must have known much more about it than his Lordship, there was no reason why he should not think so too. He would allow the appeal.”

Lord Wrenbury in his opinion, 35 T. L. R., at page 156, dealt with the question of the change of the time of service on the same principle.

In the case of *Metropolitan Water Board v. Dick, Kerr & Co.* (1918), A. C. 119, the same point was stressed by Lord Dunedin, at page 128, who referred with approval to the old case of *Jackson v. Marine Insurance Co.* (1874), L. R. 10 C. P. 125, in which the same point was involved.

The principle of frustration is pointedly illustrated by the decision of Mr. Justice Atkin, now Lord Justice of Appeal, in the case of *Lloyd Royal Belge Soc. Anon. v. Stathatos*, 33 T. L. R. 390; affirmed 34 T. L. R. 70, which was the case of a voyage charter party on a time basis made December 1, 1916, whilst the vessel was at Gibraltar.

On December 2nd the vessel was detained by British authorities, because of her nationality and held until February 10, 1917. On December 12, 1916, the charterer gave notice that he considered the charter at an end.

The action was brought by charterers under the English practice for a declaration that the charter party was terminated, and for recovery of hire paid in advance.

Mr. Justice Atkin, in the Court below, said in the course of his opinion:

"The substantial point that the plaintiffs raised was that the common adventure contemplated by both parties was frustrated by the detention and that the contract was thereby dissolved.

* * * As to the doctrine of the frustration of the adventure, I have the advantage of a definition by my brother Bailhache approved by the Court of Appeal in *Admiral Shipping Company v. Weidner, Hopkins and Co.* (33 *The Times* L. R. 71;

(1917) 1 K. B., at p. 242), where he said: 'The commercial frustration of an adventure by delay means, as I understand it, the happening of some unforeseen delay without the fault of either party to a contract of such a character as that by it the fulfilment of the contract in the only way in which fulfilment is contemplated and practicable is so inordinately postponed that its fulfilment when the delay is over will not accomplish the only object or objects which both parties to the contract must have known that each of them had in view at the time they made the contract, and for the accomplishment of which object or objects the contract was made.'

* * * * *

"But in this case it appears to me that the only adventure contemplated was one voyage outwards to New York and thence to Havre—a voyage which both parties knew the charterers desired to commence and end as quickly as possible. It is true that the parties adopted a form which is applicable to time charters and was called a time charter. In substance, the adventure was a charter for a voyage with freight payable at a time rate. In such circumstances the detention in question by the British Government for reasons of State, which would not be fully known to the parties, and for a period the duration of which must be uncertain and might be prolonged, appears to me to be just such a delay as falls within the doctrine as defined in the words I have quoted. I think, therefore, that the contract was dissolved by the happening of the detention, and I think that it was dissolved as from the date when the detention began, viz., on December 2. Should the right view be that the contract is not dissolved until one

of the parties elects to declare it dissolved, then the contract would be dissolved on December 12."

He also held that no recovery could be had of the hire paid in advance.

In the Court of Appeal the judgment was affirmed.

Lord Justice Pickford said at page 72:

"It was said that the charter was at an end because of what he would call for convenience the frustration of the adventure according to the doctrine laid down by Lord Haldane in the *Tamplin* case (32 *The Times L. R.*, 677; (1916 2 A. C., 397). It was not necessary to repeat the words used by Lord Haldane in that case. It was established that so far as this Court was concerned the doctrine which he would call the doctrine of commercial frustration of the adventure did apply to a time charter as well as to a voyage charter, and the question arose whether on the facts of this case the doctrine was applicable. He thought that the case was very near the line. But Mr. Justice Atkin had held that on the facts there was such an interruption of the common object of the parties as amounted to a frustration of the commercial adventure and that therefore the contract was dissolved. He (his Lordship) saw no reason to differ from the learned Judge's decision."

The hire paid in advance was not recoverable because:

"They could only recover the money by virtue of some provision in the contract, and as the contract had come to an end there was no provision

under which the money could be recovered. The charterers were not entitled to recover back the hire paid in advance. The appeal must be dismissed."

It is submitted that the *Lloyd Royal Belge* case goes further than the court is asked to go in this case, because the detention there might well have been of a more or less temporary nature whilst here the requisition would obviously wholly prevent the contemplated voyage being made at the contemplated time.

To the same effect are the decisions of the English Court of Appeal in the cases of the *Scottish Navigation Co., Ltd. v. W. A. Souter & Co.*; the *Admiral Shipping Co. v. Weidner Hopkins & Co.* (1917) 1 K. B. 222, which were headd together in the English Court of Appeal.*

* The following are Leading Cases on Frustration:

Cases relating to pure voyage charters or voyage charters on a time basis:

- Lloyd Royal Belge Soc. Anon.*, 33 T. L. R., 390; 34 T. L. R. 70.
Allanwilde Transport Corporation v. Vacuum Oil Co. (1919), 248 U. S., 377.
Admiral Shipping Co. v. Weidner, Hopkins & Co., 33 T. L. R. 71; (1916) 1 K. B. 429; (1917) 1 K. B. 222.
Civil Service Society, Ltd. v. General Steam Navigation Co. (1903) 2 K. B. D. 756.
Scottish Navigation Co. v. Souter & Co. (1916) 1 K. B. 675; (1917) 1 K. B. 222.
Geipel v. Smith (1872) L. R. 7 Q. B., 404; 1 Asp. Mar. Cas. 268.
Jackson v. Union Marine Ins. Co. (1874) L. R. 10 C. P. 125.

Cases Relating to Pure Time Charters:

- Bank Line, Ltd. v. Arthur Capel & Co., Ltd.*, 35 T. L. R. 150. (1918, House of Lords.)
Anglo-Northern Trading Co. v. Emlyn, Jones & Williams (1917) 2 K. B. 78; (1918) 1 K. B. 372.
The Countess of Warwick Steamship Co. v. Le Nickel Soc. Anonyme (1918) 1 K. B. 372; 34 T. L. R. 27.
Heilger's v. Cambrian Steam Navigation Co., 33 T. L. R. 348; 34 T. L. R. 72.
F. A. Tamplin S. S. Co. v. Anglo-Mexican Petroleum Co., Ltd. (1916) 1 K. B. 485; (1916) 2 A. C. 397.
Chinese Mining and Engineering Co. v. Sale & Co. (1917) 2 K. B. 599.
Lewis v. Mowinkel, 215 Fed. 710.
Isle of Mull, 257 Fed. 798.

In a very thoughtful article in 1 *Columbia Law Review*, at page 529, Mr. Frederick C. Woodward suggests the following test as to whether impossibility of performance should excuse the defendant or not:

“ * * * And to empower a court, in every case in which the enforcement of the express terms of a contract would, on account of subsequently arising impossibility, result in hardship, to assume that had the attention of the parties been called to the contingency it would have been provided for, and to act upon the fiction that it impliedly was provided for, is simply to enable it to make

Capel v. Soulidi (1916) 1 K. B. 439; (1916) 2 K. B. 365.

Furness, Withy & Co. v. Rederiaktiebolaget Banco (1917) 2 K. B. 873.

Earn Line Steamship Co. v. Sutherland Steamship Co. 254 Fed. 127 (1918); affirmed in C. C. A. February 18, 1920.

Gans S. S. Line v. The British Steamship Frankmere, 262 Fed. 819 (1920).

Cases relating to contracts other than charter parties:

Shipton-Anderson & Co. v. Harrison Brothers Co. (1915) 21 Com. Cas. 138.

Metropolitan Water Board v. Dick Kerr & Co. (1917) 2 K. B. 1; (1918) A. C. 119.

Appleby v. Myers (1867) L. R. 2 C. P. 65.

Taylor v. Caldwell (1863) 3 B. & S. 826.

Nickoll v. Ashton (1901) 2 K. B. D. 126

Howell v. Coupland (1876) 1 Q. B. D. 258.

Krell v. Henry (1903) 2 K. B. D. 740.

Stewart v. Stone, 127 N. Y. 500.

Marks Realty Co. v. Hotel Hermitage Co., 170 App. Div. 485 (N. Y. 1915).

Southern Railway Co. v. Wallace (1911) 175 Ala. 72; 56 So. Rep. 714.

Gesualdi v. Personeni (1911) 128 N. Y. Sup. 683.

Hildreth v. Buell (1854) 18 Barb. 107.

Jones v. Judd (1850) 4 N. Y. 412.

The Federal Steam Navigation Company, Ltd. v. Sir Raylton Dixon & Co., Ltd., 1 Lloyd's List, 63.

Baily v. De Crespigny, L. R. 41 Q. B. 180.

Butterfield v. Byron, 153 Mass. 517.

Spalding v. Rosa, 71 N. Y. 40.

Dolan v. Rodgers, 149 N. Y. 489.

Lovering v. Buck Mountain Coal Company, 54 Pa. St. 291.

Buffalo &c. Land Co. v. Bellevue &c. Co., 165 N. Y. 247.

Walsh v. Fisher, 102 Wise. 172, 179.

cf. Also MacKinnon on "The Effect of War on Contracts," submitted herewith.

a contract for the parties very different from that which the parties had made for themselves.

The great importance of guarding, so far as possible against such a result, is obvious. And it is believed, therefore, that a more restrictive rule must be found. With that end in view, the following is suggested: *If the contingency which makes the contract impossible of performance is such that the parties to the contract, had they actually contemplated it, would probably have regarded it as so obviously terminating the obligation as not to require expression, failure or performance should be excused.* In other words, the proper inquiry is not: Would the parties, as reasonable men, if their attention had been called to the contingency, have provided for it in their contract? That, as has been said, would be making a contract for them different from that which they had actually made for themselves. But: Would the parties, had their attention been called to the contingency, have thought it unnecessary to provide for it in the contract? That is not altering or adding to the contract, but merely construing it, as already made by the parties."

It is quite clear that Judge Hough was entirely correct in saying in his opinion, 710:

"But the defence is equitable, at least in a broad sense, and as equitable defences have made their way at law, so the doctrine of impossibility has advanced.

Wars, and the demands and destructions of war, do not change the law in one sense, but in another they do, by multiplying and enforcing circumstances showing the need of change,—of modernization.

Without war, there had come to be recognized (*inter alia*) two well known grounds of dissolution by impossibility, destruction of subject-matter without any one's fault, and failure of contemplated means of performance. Under these heads the Great War has only furnished innumerable instances and applications. I think this litigation is one of them."

Under the old decisions, fraud, illegality, duress, mistake, failure of consideration, payment, accord and satisfaction, discharge of surety, and accommodation did not excuse or constitute a defence in an action at law. 9 Harvard Law Review, 49.

The same thing was true at one time of impossibility of performance. Y. B. 22, Edward IV, pl. 26.

Formerly to avail of these defenses a defendant had to proceed by bill in chancery to restrain the proceeding at law. The equity jurisdiction was based on the ground that there was not any adequate remedy at law and prayed relief for the reasons which would now be stated in a defense in a case at law.

Indeed, in respect of some of the defenses above named, which are common enough now in actions at law, it might have been impossible to secure an injunction from the Chancellor.

It is well stated in a note on impossibility as a defense in 12 Harvard Law Review 501, at page 502 (italics ours):

"Again, the defence of impossibility is seen to avail not only where there is an 'absolute impossibility,' but often, as in the principal case, where it would be unconscionable by reason of 'relative im-

possibility' to enforce the obligation. The very word 'impossibility' seems a misnomer. *Relief of this kind is more characteristic of the ethical attitude of equity than of the unmoral attitude of law. Moreover, the course of pleading furnishes a clue. If the accepted statement that the promise is conditioned be true, an obligor charged with an absolute promise should plead negatively; but impossibility is always an affirmative defence. This, again, betrays an equitable origin. To look at the principal case * from this point of view, the covenant for quiet enjoyment is absolute, and it runs to the railway company as assignee. But it is against conscience to hold the lessors to their legal liability when the breach is authorized by an act of Parliament. The defence is conclusive, but it is not based upon the legal fiction of an implied condition. It is rather an affirmative defence equitable in origin.'*

To the same effect is a note in 19 Harvard Law Review, at page 462, in which it is said:

"The equitable nature of this defence is further emphasized by the comparatively recent extension of it to cases where, not the subject-matter of the contract, but the means of performing it has been destroyed, [*Buffalo, etc., Land Co. v. Bellevue, etc., Co.*, 165 N. Y. 247] and, also, to cases where performance of a contract for personal services has become dangerous to life or health. An illustration of the latter extension is found in a late case where an English sailor was held justified in leaving his ship upon learning that it was laden with contraband of war. [*Sibbery v.*

* *Anderson v. Manchester S. & L. R. R.*, 52 Solicitors Journal 396.

Connelly, 22 T. L. R. 174 (K. B. D. Dec. 18, 1905]. This was no case of actual impossibility, nor can any implied intention be found; but conditions had totally changed since making the contract, and a reasonable man would have been justified in declining to assume the increased risk. [See *Walsh v. Fisher*, 102 Wis. 172, 179]."

Again in 15 *Harvard Law Review*, at page 63, there is a note discussing the case of *Buffalo, etc., Land Co. v. Bellevue, etc., Co.*, 165 N. Y. 247, in which the facts were as follows:

On selling certain land to the plaintiffs, the defendants contracted to build an electric railroad nearby, on which they would run cars as often as every half hour, and they further agreed that in case this promise were broken, they would buy back the land. The plaintiffs requested that the defendants be compelled to fulfill this last promise, as they had not run cars according to agreement.

The Court held the defendant's plea, that extraordinary snowstorms had compelled them to suspend operations for a time, was a good defence, on the ground that even if the contract was absolute in form, yet it contained an implied condition that, if performance were rendered impossible without the defendants' fault, they should be relieved of liability.

The editor has this to say at page 64 (italics ours):

"The exceptions to the general rule that impossibility of performance is not a defence have crept into the law, not as excuses, but under the cover of implied conditions. In other words, the courts have held that the parties impliedly agreed there should be no performance if such con-

tingencies arose, and so, in truth, no breach of contract resulted. This cannot be regarded otherwise than as pure fiction. *As a matter of fact all thought of impossibility of performance is usually absent from the minds of the contracting parties. The defence is an equitable one, and therefore, provided beneficial results follow, the courts would be justified in holding that the implied condition relieves liability, not only where the subject-matter of the contract has been destroyed, but also where the means of performance have ceased to exist; that is, in general terms, wherever performance is rendered impossible without fault of the promisor.* Indeed, even if it is insisted that the condition must be one actually intended, it seems more likely that the broader condition would be in the parties' minds than the narrower one, limited to definite objects.

It is usually to the interest of both parties that a contract be carried out. Where performance is prevented by an event, against the occurrence of which neither can reasonably be held to have warranted, both suffer a loss for which neither is responsible. In such circumstances it seems highly unjust to throw all the loss on the one whose performance may happen to have been interfered with. Much wiser would it be to excuse the breach of the express contract, and allow a recovery for benefits actually rendered in a quasi-contractual action. Had this latter remedy been earlier recognized, it is not improbable that the courts would, before this, have admitted impossibility generally as a defence. This result may now be reached, however, by the adoption of the rule suggested by the New York court, which seems not only a natural successor of the previously recognized exceptions, but likewise eminently just."

To summarize, therefore, the doctrine of frustration of commercial contracts is an equitable doctrine not based on any fiction of implied condition, but on justice.

It is peculiarly applicable to commercial contracts because in them time is of the essence; and parties must know how to act, as soon as the fact which causes the frustration occurs.

This case is, it is submitted, a typical case for application of the rule, and the respondent was freed of all liability by the requisition.

(7) *The cases cited by the Petitioner, in which it is held that foreign governmental interference is not an excuse for non-performance of the contract, are not now the law under the better considered authorities here and in England and, furthermore, are distinguishable from this case on the ground that the governmental interference therein involved did not involve destruction of the subject matter of the contract.*

Furness Withy & Co. v. Rederiaktiebolaget Banco, 23 Com. Cas. 99, 103, was not a case of frustration. The Court, in that case, merely held that under the terms of the charter which included a "*restraint of princes*" clause the charterer was entitled to use a Swedish vessel only between such ports as the Swedish Government permitted.

There is a dictum to the effect that if there had been no "*restraint of princes*" clause the mere fact that the contract was illegal under the law of a foreign state to which one of the contracting parties belonged, would not make the contract illegal or unenforceable if it were an

English contract to be construed and enforced according to English law.

The respondent herein need not deny this dictum. His contention is simply that where the subject matter of the contract has been, in effect, *swept out of existence* by some *vis major* it is immaterial that this result is caused by the action of a *foreign* government. It will be noted that in this *Banco* case the vessel was not taken from the parties. The vessel could still be used, between Swedish ports. This narrowed the range of her use, but did not prevent it.

A similar situation often arose in respect to British time chartered ships during the war, when German and Austrian ports were illegal for them yet the charter continued operative for use to non-enemy ports. The charter was merely narrowed not destroyed.

Rederiaktiebolaget Amie v. Universal Transportation Company, Inc., 250 Fed. 400 (1918), involved a contract to purchase a Swedish ship, payments being made in the form of charter hire, the owner to deposit a bill of sale of the vessel with an American Trust company. The deposit of the bill of sale was not made, the owners claiming that Swedish law prevented.

The Court below held this was no excuse and in the Circuit Court of Appeals for the Second Circuit Judge Ward, speaking for the court, said:

“No action of the Swedish Government would excuse the defendant from its covenant to do so (deposit a bill of sale), there being no exception in the agreement like that common in charter parties and bills of lading, of arrests and restraints of princes. *Nor did the evidence adduced show any*

such restraint by the Swedish Government. Therefore the Court properly held as a matter of law that the defendant having had from December 10, 1915 to April 5, 1916 to deposit the bill of sale with the United States Mortgage and Trust Company, had breached its contract in not doing so."

As the evidence failed to show restraint by the Swedish Government, the Court's statement as to the possible result if the Swedish Government had prevented the deposit of the bill of sale, is, it is submitted, pure dictum.

This contract of sale had been entirely executed on one side. The vessel had not been requisitioned by any government or otherwise removed from the control of the parties. Therefore this case cannot be considered as an authority in the instant case, because the subject matter of the contract—the use of the vessel—was not removed from the control of the parties in such a way that the purpose of the contract could not in part at least be accomplished.

If Sweden had seized the *Ada* the situation would be different.

Jacobs v. Credit Lyonnais (1884), L. R. 12 Q. B. D. 589, was a contract made by two Englishmen for the sale of 20,000 tons of esparto to be shipped from Algeria to England. Nine thousand tons were in fact shipped and shipment of the balance was prevented by insurrection in Algeria, the workers being intimidated and the military authorities by their commands preventing collection of esparto.

It should be noted that in that case there was not a separable contract, but one for the delivery of 20,000

tons, of which almost one-half had been delivered. There was therefore no sweeping away of the *whole* subject matter of the contract. The purpose having been almost fifty per cent. accomplished, the Court could not look at the unperformed part as a separate contract for the delivery of 11,000 tons, but was compelled to consider the whole contract.

The case is, therefore, not on all-fours with the present case, where the whole subject matter was entirely removed from the control of the parties and no part of the purpose of the contract had been or could be accomplished.

In the recent English case of *Ralli Brothers v. Compania Naviera Sota Y Aznar*, (1920) 2 K. B. 287, Lord Justice Scrutton deals with the case of the *Credit Lyonnais* and distinguishes it from a case where both parties are prevented from performing a contract by foreign law, as follows, at page 301:

“Great reliance was placed by the appellants on the case of *Jacobs v. Credit Lyonnais* (12 Q. B. D. 589). The headnote in that case speaks of ‘the prohibition by the constituted authorities of the export of esparto from Algeria.’ I cannot find any authority for this in the case, which only speaks of difficulty from insurrection and Government commands in collecting and transporting cargo to the port of loading. No express exception covered this, and the attempt in the case was to introduce ‘force majeure’, which would be a defence by the French law, into the English contract. If it had been illegal to export esparto from Algeria the question in this case would have arisen.”

Tweedie Trading Co. v. James P. McDonald Co., 114 Fed. 985 (1902) was similar to the English case of *Jacobs v. Credit Lyonnais*, L. R. 12 Q. B. D. 589, in that the contract had been partly performed and therefore the whole subject matter of the contract was not swept away in the same manner as in the instant case.

It was not a charter party case, but a breach of contract to supply laborers, full performance of which was prevented by the law of Barbados.

The case of *Tweedie Trading Co. v. McDonald*, 114 Fed. 985, is criticised as a very narrow decision in 16 Harvard Law Review, at page 64. The tendency to a broader rule in this country is noted. It is there said in a note:

“This case is apparently the first in this country in which the point was involved, and, in following the English rule, it would seem to oppose the present commendable tendency of some American Courts to extend the scope of impossibility, as an excuse. See *Lovring v. Buck Mountain Co.*, 54 Pa. St. 291; *Buffalo, etc., Co. v. Bellevue, etc., Co.*, 165 N. Y. 247. See 15 Harv. L. Rev. 63, 418.”

As is shown below the English rule has now been changed and impossibility by foreign and domestic law is now on the same footing and as an excuse for non-performance of a contract.

The cases of *Liverpool v. Phenix Insurance Co.*, 129 U. S. 397, and *China Mutual Insurance Co. v. Force*, 142 N. Y. 90, are to the effect that unless the parties have some other law in mind at the time of making a contract its construction, nature and obligation are to be deter-

mined by the law of the place where it is made. Where one party, therefore, has an excuse for non-performance under some foreign law, if the excuse is not valid under the *lex loci contractus* he will not be excused.

The appellant has cited various other cases which are not authorities against the proposition that the charter party was frustrated in this case.

We have ventured to add as Appendix A to this brief a differentiation of the principal cases cited by the appellant from the situation that existed in the instant case.

The respondent herein is not claiming a defence under foreign law. It claims a good defense *under American law*, on the ground that the contract of charter-party was frustrated by the Governmental Act of the British Government, hence these cases are beside the point.

Under English decisions it is settled that if foreign law prevents both parties from performing a contract, neither has an action against the other even if the contract be absolute.

Ford v. Cotesworth, 1868, L. R. 4 Q. B. 127; affirmed L. R. 1870, 5 Q. B. 544.

Cunningham v. Dunn, 1878, L. R. C. P. D. 443.

Ralli Brothers v. Compania Naviera Soto Y Aznar, 1920, 2 K. B. 287, (Court of Appeal.).

In *Ford v. Cotesworth*, L. R. 1868, 4 Q. B. 127; affirmed L. R. 5 Q. B. 544, a charter party for a full cargo provided that the ship should proceed to Lima or Valparaiso, as ordered, and there "deliver the said cargo in the usual and customary manner, agreeable to bills of lading, and so end the voyage."

She was ordered to Lima, and arrived at Callao, the port of Lima on March 1st. Goods could only be landed

there by launches or lighters provided by the merchant and only through the Custom House.

Whilst the ship was unloading, about April 11th, the authorities refused to allow any more cargo to be landed at the Custom House in consequence of anticipated danger from the Spanish Fleet in the neighborhood. About the 18th the ship was ordered to move out of the expected line of fire of the Spanish Fleet.

On the 26th, the ship had, on peremptory orders, moved away several miles and did not return until May 12th, when the discharge was proceeded with and finished.

It was held by the Exchequer Chamber, affirming the decision of Justice Blackburn in the Queens Bench that inasmuch as both parties were prevented from performing their contract by the intervention of the authorities at the port of discharge, the shipowner could not recover for demurrage.

Kelly, C. B., said, *L. R. 5 Q. B.*, at page 547:

"I was from the first prepared to agree with the Court of Queen's Bench in treating the delivery of the cargo at the port of destination as one entire act, in which both parties have to perform their parts; the defendants have to provide lighters and the plaintiffs to assist in putting the goods over the side of the ship; and the plaintiffs were as much prevented from doing their part as the defendants. For had the defendants provided lighters, as it was contended they ought to have done, notwithstanding the order not to land any more goods, no doubt the authorities would have prevented the goods from being put on board the lighters; and it is absurd to suppose that the

goods could have been put into seventy or eighty lighters, and left floating in the harbour.

“It is clear that the effect of the order forbidding the landing of goods was to prevent, not only the defendants from performing their part, but also to render it practically impossible for the plaintiffs to perform theirs. Although it might not have been rendered physically impossible to put the goods over the side of the ship, yet the whole process of landing was prevented by a cause over which neither party had any control; and consequently, this action is not maintainable.”

In *Cunningham v. Dunn*, 1878, L. R. C. P. D. 443, it was agreed by charter party that the steamship *Rainton* “now on her way to Genoa and Malta shall, with all convenient speed, after loading dead weight at Malta for owners proceed to a Spanish port, to be ordered by the charterer, or so near thereto as she may safely get”, and there load from the charterer’s factors the remaining measurement space for cargo for London. Restraint of princes was not excepted.

The charterer knew that the dead weight to be taken in at Malta was military stores and became aware before ordering the ship to Valencia that with military stores on board she would not by Spanish law be allowed to take other cargo there.

Efforts were made by the British Ministry at Madrid to allow the *Rainton* to load at Valencia, but this permission could not be obtained. She sailed away without loading immediately after her arrival at Valencia. The charterer sued for a breach of charter party.

Lord Coleridge, Lord Chief Justice, held that ship owners were not liable, citing, among other cases, *Ford v. Cotesworth*.

On appeal Lord Justice Bramwell said at page 447 (Italics ours):—

“My judgment is for the defendants, and the grounds of it are, *first, that there was at Valencia a joint inability to perform the charterparty, and not a refusal by the defendants so to do*; secondly, that there was no warranty that the dead weight should be such as to allow the vessel to be loaded; thirdly, that if the defendants were bound not to disable themselves from taking on board the plaintiff's cargo, they did not know at the time of entering into the charterparty that they would so disable themselves; and, fourthly, that the plaintiff gave the defendants license to sail to Valencia with the military stores on board.”

Lord Justice Brett, after recognizing that there was an absolute undertaking in the charter to load the cargo at Valencia, said at page 449:

“In my opinion, the result of the evidence is that it was agreed that the defendants might take on board at Malta military stores as dead weight, and that after loading them the ship should proceed to Valencia. When she reached that port, in all respects but one, she was ready to load such a cargo as was mentioned in the charterparty; the defendants had done nothing inconsistent with their contract, and had done only what they were entitled to do. But by reason of Spanish law, and of the refusal of the Spanish Government to mitigate it, the defendants were not ready to load, but

also the plaintiff was not ready to put the cargo on board: the law of Spain prevented the parties from performing what they had respectively undertaken to do. *Ford v. Cotesworth*, Law Rep. 4 Q. B. 127; 5 Q. B. 544, is in point, and seems to me to decide this case; it establishes that where neither party is ready to perform his undertaking because both are prevented by some superior power, neither party can maintain an action against the other. For these reasons I think that the judgment of Lord Coleridge ought to be affirmed."

Lord Justice Cotton said at page 449:

"When the defendants' ship reached Valencia, so far as the purposes of navigation were concerned, she was ready to receive the agreed cargo, but she was prevented from loading it because she had on board military stores. We may assume that the plaintiff had provided a cargo; but both parties were prevented from performing their respective undertakings by the prohibition of the Spanish Government. * * * All that the ship-owners have done has been done in accordance with the terms of the contract. The charterer cannot say that the ship has not been loaded through the default of her owners: the act of the Spanish Government has prevented the contract between the parties from being carried out."

These decisions were adversely criticised in Carver on Carriage by Sea, (6th Ed.), Sections 129 and 616, page 801, but never, so far as counsel can find, by any Courts.

The English Court of Appeal, however, in the case of *Ralli Brothers v. Compania Naviera Soto y Aznar*, 1920, 2 K. B. 287, settled the question that *Ford v. Cotesworth* and *Cunningham v. Dunn* stated the law in the English Courts.

In the *Ralli Brothers* case, a Spanish steamship, the *Evetza Mendi*, was chartered by Englishmen under a charter made in London in July, 1918, to carry jute from Calcutta to Barcelona at fifty pounds freight per ton, one-half payable on sailing, balance payable on delivery.

On arriving at the port of discharge it was found that by Spanish law which went into force in September, 1918, the freight rate payable on jute was fixed at a maximum of 875 pesetas per ton, much less than the charter party rate.

The receivers of cargo tendered the balance due according to Spanish law and the Spanish owners, as the charter did not contain any cesser clause discharging charterers from liability brought action in England against the charterers to recover the balance due up to the charter party rate.

The decision of Mr. Justice Bailhache disallowing this claim was affirmed by the English Court of Appeal, which followed and approved *Ford v. Cotesworth* and *Cunningham v. Dunn*, and distinguished the case of *Jacobs v. Credit Lyonnais*, 1884, L. R. 12 Q. B. D. 589.

The Lord Justices called attention to the recent decisions which had tended to excuse a party from performing a contract when his inability to do so arose not from his own fault but from the law or from the act of a government. In dealing with the specific point raised by the petitioner here that there was a difference between

performance rendered unlawful by the Government of the country where the Court was sitting, and the Government of a foreign country, the Court held there was not any difference in principle between impossibility due to foreign law, and impossibility due to domestic law.

The charter party had a restraint of princes clause in it but it was not provided that the exception should be mutual so as to excuse the charterers, and all the Lord Justices disregarded the exception—Lord Sterndale at page 292, Lord Justice Warrington at page 297 and Lord Justice Scrutton at page 304.

The Lords Justices were unanimous in dismissing the appeal.

They all express the opinion, Lord Sterndale, at page 291, Lord Justice Warrington at pages 296 and 297, and Lord Justice Scrutton, at page 303, that the case of *Barker v. Hodgson*, 3 M. & S. 267, 270, and other similar cases were wrongly decided and that the decisions in them would have been different if they had come up at the present time.

There could not be a more specific repudiation of the narrow doctrine contended for by the petitioners' counsel here, than the *Ralli Brothers* case.

Lord Justice Scrutton, at page 300, shows that a modern judge takes a very different attitude on the questions of international private laws and the observance of laws of foreign countries from the attitude that used to be taken. He says at page 300:

“In my opinion the law is correctly stated by Professor Dicey in *Conflict of Laws*, 2nd ed., p. 553, where he says:

'A contract . . . is, in general, invalid in so far as . . . the performance of it is unlawful by the law of the country where the contract is to be performed'—and I reserve liberty to consider whether it is any longer an exception to this proposition that this country will not consider the fact that the contract is obnoxious only to the revenue laws of the foreign country where it is to be performed as an obstacle to enforcing it in the English Courts. The early authorities on this point require reconsideration, in view of the obligations of international comity as now understood."

Lord Justice Scrutton continues at page 300:

"The argument addressed to us was that illegality by foreign law was only impossibility in fact, which the parties might have provided against by their contract, and for which they must be liable, if they had not expressly relieved themselves from liability. This is the old doctrine of *Paradine v. Jane*, Aleyn, 26, 27: 'When the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.' It was emphasized by Lord Ellenborough, in *Atkinson v. Richie* (1809) 10 East, 530, 533, where he said: 'No exception (of a private nature at least) which is not contained in the contract itself, can be engrafted upon it by implication, as an excuse for its non-performance.' And Lord Bowen as late as 1884 in the case of *Jacobs v. Credit Lyonnais*, 12 Q. B. D. 589, cited Lord Ellenborough's approval of *Paradine v. Jane*, Aleyn, 26, 27, with approval. But the numerous cases, of

which *Metropolitan Water Board v. Dick, Kerr & Co.*, [1919] A. C. 119, is a recent example, most of which are cited in McCardie, J.'s exhaustive judgment in *Blackburn Bobbin Co. v. Allen & Sons*, [1918] 1 K. B. 540, 546, have made a serious breach in the ancient proposition. It is now quite common for exceptions, or exemptions from liability to be grafted by implication on contracts, if the parties by necessary implication must have treated the continued existence of a specified state of things as essential to liability on the express terms of the contract. If I am asked whether the true intent of the parties is that one has undertaken to do an act though it is illegal by the law of the place in which the act is to be done, and though that law is the law of his own country; or whether their true intent was that it shall be legal for him to do the act in the place where it has to be done, I have no hesitation in choosing the second alternative. 'I will do it provided I can legally do so' seems to me infinitely preferable to and more likely than 'I will do it, though it is illegal'."

He says at page 302 (Italics ours):

"*Ford v. Cotesworth* (1868) L. R. 4 Q. B. 127; L. R. 5 Q. B. 544, would now, under the House of Lords decisions, be decided as a matter of course in favour of the party sued—for the foreign prohibition would be an existing circumstance to be taken into account in fixing the reasonable time in which the act omitted was by implication to be done. Such reasonable time would not now be construed as normal time under normal conditions. In the Exchequer Chamber the case was again put on reasonable time, as distinguished from fixed time, and the ground that a cause of

delay affecting both parties must be considered in fixing reasonable time. In *Cunningham v. Dunn*, 3 C. P. D. 443, the ship was to proceed to Malta and load with dead weight, which both parties knew would be military stores, and then proceed to a Spanish port to load fruit. On arrival at Valencia it was found that the law of Spain did not allow cargo to be loaded on a ship which had military stores on board, and when it was found that permission could not be obtained the vessel sailed away. The charterer sued her, and the Court of Appeal held that both parties being prevented by superior power neither was liable, citing *Ford v. Cotesworth* (1868) L. R. 4 Q. B. 127; L. R. 5 Q. B. 544. The late Mr. Carver forcibly criticises these two cases on the ground that in neither was there really joint disability, but takes the view, in which I concur, that they are both supportable on other grounds, which I take to be that in *Ford v. Cotesworth* (1868) L. R. 4 Q. B. 127; L. R. 5 Q. B. 544, a reasonable time case, the time must be judged by the then existing circumstances, and that in *Cunningham v. Dunn*, 3 C. P. D. 443, the parties must be taken to have contracted on the basis that it should be legally possible to load that ship. At the time the two cases were distinguished from *Barker v. Hodgson*, 3 M. & S. 267, and other fixed lay days cases, on the ground partly of no fixed time partly on joint inability. It may be possible to put the earlier cases on the ground that a contract to load in fixed days, unless prevented by specified causes, excludes implied causes such as foreign illegality. An instance of this class of case is *Braemount Steamship Co. v. Andrew Weir & Co.* (1910) 15 Com. Cas. 101, where a clause excusing payment of hire in certain named events

was not extended to an unnamed event, strikes, which prevented the vessel being profitably used, though "strikes" were included in an exception clause. *But in my opinion at the present day, in the absence of very special circumstances, cases which decide that a contracting party who has undertaken to do something in a foreign country is not relieved from his obligation by the fact that such an act is, or becomes, illegal in that foreign country are wrongly decided; and this is the true view to be taken of early cases like Barker v. Hodgson, 3 M. & S. 267, decided before the Courts had developed the doctrine of continued validity of contracts being dependent impliedly on the existence or continuance of certain states of fact.* Bailhache, J., treats the case as one of a joint act to be performed by both parties, paying and receiving a fixed amount of freight, in a country where it is illegal to pay or receive such an amount; and such a joint act prevented by illegality as being within the principle of *Ford v. Cotesworth*, L. R. 4 Q. B. 127; L. R. 5 Q. B. 544, and *Cunningham v. Dunn*, 3 C. P. D. 443, which are binding on him. *In view of the fact that the recent decisions of the House of Lords would require or enable the results of those decisions to be justified in quite a different way, I should prefer to state the ground of my decision more broadly and to rest it on the ground that where a contract requires an act to be done in a foreign country, it is, in the absence of very special circumstances, an implied term of the continuing validity of such a provision that the act to be done in the foreign country shall not be illegal by the law of that country. This country should not in my opinion assist or sanction the breach of the laws of other independent States.'*

The distinction between the case of the *Baron Ogilvy* and the other cases which have been cited by the petitioner, is that the charter in the case of the *Baron Ogilvy* was not merely rendered illegal by the law of Great Britain, but it was rendered impossible by an Executive act of the Government of Great Britain whilst the steamship was within Great Britain.

This is the distinction Judge Hough made in his opinion here. He said, 707-709:

“The fact that the interfering action was governmental and foreign, has been the groundwork or moving cause of libellant’s action. That is, reliance is placed on decisions holding that foreign governmental *vis major* preventing performance does not excuse. No decision binding on this court goes so far as to state the rule as above argued for. Whether the English cases touching on the matter can be reconciled, I more than doubt, but am not much concerned with: but neither *Liverpool &c. Co. v. Phenix*, 129 U. S. 397, nor *The Ada*, 250 F. R. 400, decided more than that one who in this country made a lawful contract, not in accord with the law of his own country, could not plead the foreign law to prevent his paying damages.

“That is a very different thing from destroying (in a very real sense) the subject matter of agreement. If it be true as I believe it to be, that for the purpose of this suit the *Ogilvy* was or became non-existent, then the governmental element becomes as unimportant as the foreign, also the absence of the ‘restraint’ clause, and the question is really reduced to its lowest terms, viz: whether the facts present a case of that ‘impossibility of performance’ which is and long has been

a recognized and growing reason for dissolving a contract."

The *Baron Ogilvy* charter was, therefore, terminated by what was in effect a destruction of the subject matter and all contract relations between the libelant and respondent which had arisen by reason of their having entered into the charter were entirely ended because:

1. The ship was entirely taken away from the charterer's service by Governmental *vis major* without fault on the part of the shipowner.

2. The subject matter of the charter contract, which was the commercial services of the steamship *Baron Ogilvy* for the charterer, in carrying case oil on a voyage from Port Arthur to South Africa with a cargo of petroleum in cases, commencing not later than May 15, 1915, was rendered wholly impossible.

3. The vessel was in fact not released from the requisition until a period much greater than would have been required for performance of the charter.

SECOND POINT.

IF THE COURT SHOULD FIND THAT THERE WAS NOT A FRUSTRATION OF THE CONTRACT OF CHARTER PARTY, WHEREBY THE RIGHTS AND OBLIGATIONS OF THE PARTIES THERETO WERE TERMINATED, AS ABOVE CONTENDED, RESPONDENT HOGARTH SHIPPING COMPANY, LIMITED, IS NOT LIABLE FOR FAILURE TO TENDER THE STEAMSHIP *Baron Ogilvy* UNDER THE EXPRESS PROVISIONS OF THE SPECIAL CLAUSE OF THE CHARTER PARTY.

They were a part of the contract when it was signed. This is shown by the charter party itself, *Libellant's Exhibit 2*, 470-473, concerning which Mr. Mouris, who acted as agent for the respondent Hogarth Shipping Company, Limited, testified. *Mouris*, 109-110.

The special clause which was attached to the charter party at the time of signing is, in part, as follows:

"It is a condition of this charter and the charterers undertake that:—

(1) The ship shall be employed only in such trades and employments and shall carry only such goods, persons and things as are lawful for a British ship.

* * * * *

(3) There shall not be any breach of any of the warranties which are now or may during the continuance of this charter be contained in the policies or contracts of insurance of the ship with the War Risks Insurance Association in which the ship is entered. The warranties now contained in such policies are as follows:

(a) *That the ship shall comply, so far as possible with the orders of His Majesty's Government and the directors of the Committee as to routes, ports of call and stoppages.*

(b) *That the ship shall not start on the voyage if ordered by His Majesty's Government not to do so.*

* * * * *

"Upon breach of any of the conditions and undertakings mentioned in this clause, the owners shall have the right at any time to withdraw the ship from the service of the charterers, but notwithstanding such withdrawal the charterers shall in addition to any liability for damages, continue liable for the hire or freight hereby agreed to be paid.

"The above clauses to be incorporated in all bills of lading." 469-473.

These clauses amount in effect to a restraint of princes clause or at least to a provision that the vessel would be excused from not performing any voyage which the British Government forbade. They undoubtedly did forbid the charter voyage in the present instance.

The effect of the incorporation of such clauses in a charter party in excusing non-performance by the owner is evidenced by the case of *The Athanasios*, 228 Fed. 558, where the charter did not contain any *restraint of princes* exemption, but in which it was provided that bills of lading given under it should contain such a restraint. Judge Hough excused an owner from performance of a voyage charter on that ground.

Consequently, it is submitted the special voyage charter clause operates as an exception excusing non-performance of the contract by the owners.

THIRD POINT.

THERE IS NO LIABILITY ON THE PART OF RESPONDENTS HUGH HOGARTH AND SONS FOR FAILURE TO TENDER THE STEAMSHIP *Baron Ogilvy* OR SOME OTHER STEAMSHIP FOR PERFORMANCE OF THE CHARTER PARTY.

Respondent Hugh Hogarth and Sons did not own the Steamship *Baron Ogilvy* or any other vessel. *Hogarth*, 136, 139, 157-169. *Thompson*, 399, 400, 434. They were managers of the Hogarth Shipping Company, Ltd. 135. They acted throughout as agents, *Hogarth*, 136, 169-170, *Thompson*, 400, for an undisclosed principal whom the libelant has elected to sue.

Their agency is not disputed and appellant apparently admits that they are not subject to liability in this suit, a fact which, it is claimed, was not clear when the libel was originally filed. 88-89.

FOURTH POINT.

IF THE APPELLANT HAS ANY CLAIM AGAINST ANYONE ITS CLAIM LIES AGAINST THE BRITISH GOVERNMENT FOR HAVING TAKEN FROM IT THE USE OF THE STEAMSHIP *Baron Ogilvy*.

If the libelant has suffered any damage by reason of the act of the British Government its remedy lies by proceedings in the British Courts by petition of right against the British Government.

This is the intimation of the libellant's proper remedy in the event of a frustration of a time charter party by requisition contained in *Chinese Mining & Engineering Co., Ltd. vs. Sales & Co.* (1917), 2 K. B. 509, at the top of page 602.

It is settled that such a petition is maintainable by an American citizen or corporation because of the reciprocal rights given in our Courts for suits against the Government by English citizens.

United States vs. O'Keefe, 11 Wall. 178;
Statutes of 23rd and 24th Vict. July 3, 1860.

An instance where a British steamship owner was allowed to sue the United States Government in the Court of Claims in the case of *Maclay vs. U. S.*, 43 Court of Claims 90, and an instance of suit under the Tucker Act in our District Court is the case of the *New York & Oriental S. S. Co., Ltd. vs. U. S.*, 202 Fed. 311; 216 Fed. 61, which was tried before Judge Learned Hand and affirmed by the Court of Appeals.

In that case a stipulation was entered into by the District Attorney here that the statutes above mentioned and *U. S. vs. O'Keefe*, 11 Wall. 178 should be received as evidence of the fact that the Government of Great Britain accords to citizens of the United States the right to prosecute claims arising from express or implied contracts against the Government of Great Britain in the Courts of that country.

Thus the appellant is not remediless if it can make out a proper case. It has merely mistaken its remedy and its claim, if it has any, is against the British Government

direct, not against the ship-owner who has been guiltless of any breach of contract and whose charter party to the appellant was frustrated by the action of the British Government.

LAST POINT.

THE DECISIONS OF THE COURTS BELOW SHOULD BE IN ALL RESPECTS AFFIRMED WITH COSTS.

Respectfully submitted,

JOHN M. WOOLSEY,
Of Counsel.

January 15, 1921.

APPENDIX A.

Cases cited by appellant's counsel analyzed and distinguished.

1. The following cases mentioned at page 31 of petitioner's brief relate to whether the fact that foreign law prevents performance of the contract at the place where it is to be performed is an excuse under the *lex loci contractus*. As the appellees claim a frustration under American law, these cases are beside the point.

Lloyd v. Guibert, 6 Best & S. 100.

Liverpool v. Great Western Company, 129 U. S. 397.

China Mutual Insurance Company v. Force, 142 N. Y. 90.

2. *Howland v. Greenway*, 22 Howard 491, was a case of seizure of goods by the authorities in Rio de Janeiro, because the manifest was improperly made out. In an action on the bill of lading, recovery was allowed because the master of the vessel was negligent in not acquainting himself with the laws of the country with which he was trading, and duly conforming thereto.

3. *The Harriman*, 9 Wall. 161 (1868), involved a failure to deliver under an entire contract and it was held that since there was no delivery, no freight was due. There was no destruction of the subject matter of the contract in this case.

4. *The Progreso*, 50 Fed. 835 (1892), was not the taking of a ship, but merely a prevention of its use under the charter party, for a definite period of one month, known in advance. This is quite different from a requisition for an indefinite period.

5. *McDermott (Ingle) v. Jones*, 2 Wall. 1 (1864), held that a builder of a house, under contract, on land in which there was a latent defect which required subsequent repairs, was not excused by the latent defect from paying for the subsequent repairs. This is a quite different case from the instant case. If the land had *disappeared* in some manner it might have been analogous. It only involved greater difficulty and expense in performing the contract than was contemplated.

6. In *Blackburn Bobbin Company v. T. W. Allen, Ltd.*, 23 Com. Cas. 471, in the Court of Appeal in England, there was a contract to deliver timber from Finland on railroad tracks at Hull. Owing to the war the timber had to be sent via Scandinavia, instead of direct. It was held that the contract was not frustrated on the specific ground that the means of transportation of the timber was not of the essence of the contract and appeared to be unknown to the plaintiff. The Court very carefully distinguished the question involved from the question of frustration of charter parties, and said at page 472:

* * * "There is really nothing to show that the continuance of that normal method (of transportation) was at the basis of the contract in the minds and intention of the contracting parties. The contract was merely one for the delivery of a

certain quantity of Finnish timber, free on rail at Hull. The plaintiffs did not know how the timber was normally conveyed from Finland to Hull and I see no reason for holding that the normal mode of conveyance must be deemed to have been in their mind and intention."

7. In *Hudson v. Hill*, 2 Asp. Mar. Cas. 278 (1874), a vessel was chartered to carry sugar from Barbados to London. The charter was made December 28, 1870, the vessel to "proceed forthwith" to loading port, laydays not to commence before April 1st. There was not any cancelling date in the charter. Owing to excepted perils, the vessel did not arrive until July 28th, which was the very end of the sugar season. The charterer refused to load and the vessel left for other business. The owner sued for breach of contract and the jury found that the date of arrival did not put an end, in a commercial sense, to the adventure. A verdict for the plaintiff was directed and the Court of Common Pleas discharged a rule to set aside the verdict, as against the evidence, saying that it was not impossible to load, although it was perhaps impossible to load at a profit.

The principle of frustration was therefore clearly recognized, but on the particular facts of the case it was found that the contract was not frustrated. We are not given the circumstances in detail, upon which the jury arrived at their conclusion and, therefore, it is submitted that the case cannot properly be considered as against the contention of the respondents in the instant case that the charter party of the *Baron Ogilvy* was frustrated.

Furthermore, *Hudson v. Hill* did not involve any taking of the vessel or removal of it from the control of

the parties, but simply a delay in reporting at loading port, which is quite a different matter.

8. *The Star of Hope*, Fed. Cas., No. 13,312 (1866), was a case of a voyage charter party to carry cargo from a port in Maine to Fort Gaines, Alabama. There was a delay in reporting at loading port, caused by excepted perils. The charterer repudiated the contract, but it was held that the charter party was not frustrated by the delay. No taking of the vessel was involved and the cargo in question was actually carried by the vessel, the parties agreeing to litigate the question of whether freight was payable at the rate of the original charter or the rate of a subsequent charter. The Court held that the original charter rate should be allowed, because the charter party had not been frustrated.

9. *Barker v. Hodgson* (1814), 3 Maule & S. 269, did not involve any taking of the vessel, but merely a prohibition of intercourse between the vessel and the shore at the loading port, because of pestilential disease.

10. *Ashmore v. Cox*, L. R. (1899), 1 Q. B. D. 436, involved a contract to sell hemp to be shipped from a port in the Philippines, by sailing vessel, between May 1st and July 31, 1898. There was a provision that if the goods did not arrive, from the loss of the vessel or other unavoidable cause, the contract was to be void. It was stated that owing to the Spanish-American War the shipment could not be made, but it does not appear in just what way shipment was prevented. A shipment was subsequently made by steamer on September 15th, and the shipment was declared under the contract, by the

sellers, on October 27th. The buyers refused to accept the declaration.

It was held that the declaration was defective; that a proper declaration was a condition precedent; that there was no implied condition of impossibility of performance and that the express exception only applied to goods shipped between May 1st and July 31st, and hence was inapplicable to the goods declared. The Court therefore gave the intended purchasers judgment against the sellers, for breach of contract.

The nature of the impossibility of performance in this case is not stated, but the case is clearly distinguishable from the instant case, because *no specific goods were involved*, and, as the Court intimates at page 442, if the sellers had declared hemp shipped between May 1st and July 31st, the sellers might have escaped liability.

Lord Russell said at page 442:

“The ship was not, as it were, ear-marked. The seller might appropriate to the contract any shipment of proper quality, by sailer or sailers within the stipulated dates.”

This being so, it cannot be said that the subject matter of the contract was destroyed. The trouble was that the only declaration of goods which was made was void.

11. *Carnegie Steel Company v. United States*, 240 U. S. 156 (1916), was a government contract for eighteen-inch steel plates, in manufacturing which the Steel Company met with unforeseen and very serious difficulties, owing to the fact that similar articles had apparently never been previously manufactured and the tests were

severe. The plates were, however, eventually supplied and the litigation involved the recovery of certain deductions made under the contract, for delay in their manufacture. A clause of the contract provided that delays which the Chief of Ordnance might determine to have been due to unavoidable causes, such as fires, storms, labor strikes, actions of the U. S., etc., should be excepted.

The Court gave judgment for the government, holding that the deductions were properly retained by it and that the delay under the rule of *ejusdem generis* was not covered by the exception.

The case did not involve any claim of frustration of contract. The contract was in fact carried out. It is therefore not in point.

12. *Richards & Company, Inc. v. Wreschner*, 174 N. Y. App. Div. 484 (1916), was a contract to deliver Belgian antimony at New York or Boston during the months of February to September, 1914. The only source of supply of this material was in Belgium. Antimony was supplied from February to July, but default was made during August and September, owing to the German invasion and an embargo by the German Government on its exportation. The Court held that non-performance was not excused.

Mr. Justice Weeks said at pages 486-487:

* * * "It does not appear that the defendants could not have guarded against the very contingency which has arisen, by providing themselves with a sufficient supply of antimony to make deliveries during the last two months of the contract, by shipments from some port in Europe,

*nor does it appear that they could not have procured the antimony from a warehouse in some non-belligerent country of Europe * * *."*

This case is clearly distinguishable from the instant case, because it was not a contract for specific antimony and it was not shown that other antimony was not available.

It is also distinguishable on the ground that the contract was not separable and that it was performed except as to the last two months.

13. *Cameron-Hawn Realty Company v. City of Albany*, 207 N. Y. 377 (1913), was a contract to pave a street in accordance with a city plan and keep it in repair for ten years, the city retaining five per cent. during the first two years as security for maintenance. The paving was done, but owing to the inappropriate nature of the paving as required by the city plan, the maintenance became a burden, and after two years the Realty Company claimed it was excused from its contract of maintenance.

The Court held that this was not the case.

There was no removal of the subject matter of the contract in this case; but the contract was merely not profitable and the case is therefore not in point.

14. *Kirk v. Gibbs*, 1 H. & N. 810; 26 L. J. Ex. 209, was a case where the owner of a vessel sued the charterer for not loading a full cargo. The charterer set up the fact that the Peruvian authorities only permitted this particular vessel to load the amount which was actually loaded. It was held that inasmuch as it was the char-

terer's duty to procure the permit and there was no allegation that the vessel was in an improper condition to load the full cargo, the owners were entitled to recover.

This was not a separable contract and was partially performed and rests on the ground of a breach of duty on the part of charterers.

15. *Beebe v. Johnson*, 19 Wend. 500 (1838), was a contract to perfect in England a patent, so as to insure the plaintiff the exclusive use in Canada. It later developed that the right was not given by England, but by the Canadian Government and only granted to the subjects of Great Britain or residents of the provinces, and hence could not be granted to the plaintiff.

It was held that this was not an excuse for non-performance and that the plaintiff was entitled to damages.

This is a case of a contract to do something which was impossible at the start and not a case of a contract which was perfectly possible when made, but was rendered impossible by a supervening act, which swept away the subject matter of the contract.

16. *Holyoke v. Depew*, Fed. Cas. 6652 (1868) was a voyage charter of a vessel to carry goods from the Canary Islands to New York. Upon arrival the authorities would not permit part of the cargo to be loaded, as the vessel came from an infected port.

It was held that inasmuch as the vessel was in fault in not being in proper condition to receive the cargo, in an action by the owner to recover freight on the goods actually carried, the charterer might set off damages

caused by the vessel's failure to load the other cargo up to the amount of the freight on the cargo actually carried.

This is not a taking of the subject matter of the contract in any manner, but a default of the vessel.

17. In *Jones v. Holm*, L. R. (1867) 2 Exch. 335, a vessel when partly loaded with cargo caught fire and was scuttled. The cargo which was on board and was damaged was sold at auction. The cargo which had not yet been loaded, was forwarded by another ship. The vessel was raised, repaired and tendered by the owners for the remainder of the cargo, two months after the date of the fire. The charterers repudiated the charter party.

The Court held that there was no frustration.

In reaching this result Baron Bramwell said:

“The first objection made by the defendant was that in the circumstances under which the delay caused by this accident occurred, the voyage became a different voyage; that the ‘original voyage’ was frustrated and the case is therefore within the rule which in the case of such frustration excuses the charterer from loading. *I do not, however, think that the facts stated have this effect. Nothing was said to show that the two months lost made the voyage a different voyage from that agreed for * * *.*”

This is another case where on the facts the charter party was held not to be frustrated by the delay in that particular case. It is submitted that this case is, however, quite different from the instant case. The delay

was not of indefinite extent, but could be calculated in advance and was within the full knowledge of the parties.

18. *Hasler v. West India Steamship Company*, 214 Fed. 862 (1914), turns on the question of equitable estoppel and right of cancellation, and has no relation to frustration.

19. *Hurst v. Usborn* (1856), 18 C. B. 141, is another case of delay in arriving at loading port, which involved no destruction of the subject matter of the contract. The ship reported within the terms of the charter and found the charterer in breach of his obligation because he was without ready cargo. This is quite different from the instant case.

20. *The Assicurazioni Generali & Schencker & Co. v. Steamship Bessie Morris Co., Ltd.* (1892), 7 Asp. Mar. Cas., 217, was the case of a vessel chartered to carry from Adriatic ports to London. She loaded and sailed, but became disabled by stranding in the course of her voyage. The vessel was seriously injured and the shipowner refused to continue his voyage, but in an action by the charterer it was held that since the vessel was commercially capable of being repaired and proceeding with the voyage within a reasonable time, the shipowner was liable for non-performance and did not have a right to abandon the voyage.

The vessel was at all times within the control of the parties and whether she could be repaired and returned to service within a reasonable time could be ascertained

by them. On this ground the case is clearly distinguishable from the instant case.

21. The following cases turn upon the consideration of the particular contract in question:

United States v. Gleason, 175 U. S. 588;

Chicago, Milwaukee, etc. Railway v. Moore, 240 U. S. 165.

22. *Atkinson v. Ritchie* (1809), 10 East 530, involved a voyage charter to carry goods from St. Petersburg to England. When only partly loaded the Master sailed in consequence of a rumor that an embargo was about to be placed on all English ships. The Master was held liable to the charterer for not loading a full cargo.

There was no actual seizure of the vessel in this case and the Master acted improperly. It is therefore different from the instant case.

23. In *Ye-Seng Company v. Corbitt*, 9 Fed. 423, a vessel was chartered to carry passengers from Hong-kong to Portland. Upon arrival the port authorities, owing to her condition, would not permit her to load passengers. The charterer sued the owner on the contract and recovery was allowed on the ground that the contract had been breached because the vessel was not safe to carry passengers.

This case merely holds that an owner cannot tender an unfit vessel which the port authorities will not permit to perform their contract and then, having created the difficulty through his own fault, claim that the contract has been frustrated by the port authorities.

24. *Columbus Railway Power & Light Co. v. City of Columbus*, 249 U. S. 399 (1919). The city, by an ordinance which was accepted by the Street Railway Company, had a contract binding the railway to furnish street railway service for twenty-five years, at a specified rate, in return for the use of the streets. During the period the contract became unprofitable to the Street Railway Company, owing to the increase of wages allowed employees by the War Labor Board. It was held that the Railway Company must still perform its contract.

Mr. Justice Day, who delivered the opinion of the Court, says, at page 410:

“There is no showing that the contracts have become impossible of performance. Nor is there any allegation establishing the fact that taking the whole term together the contracts will be necessarily unprofitable. * * * There is no showing in the bill that the War or the award of the War Labor Board necessarily prevented the performance of the contract. Indeed, as we have said, there is no showing, as in the nature of things there cannot be, that the performance of the contract, taking all the years of the term together, will prove unremunerative. We are unable to find here the intervention of that superior force which ends the obligation of a valid contract by preventing its performance.”

On these grounds the case is clearly distinguishable.

This case was decided April 14, 1919. At page 413 the Court discusses the case of *Metropolitan Water Board v. Dick Kerr & Company, Ltd.*, (1918) A. C. 119, distinguishes it from the case which was then before the

Court, on the ground that the interruption in the *Metropolitan* case was of such character and duration as to make the contract when resumed a different contract from the contract when broken off, and also on the ground that the *Metropolitan* case involved a direct intervention of the power of the government.

25. *The Sun Printing and Publishing Association v. Moore*, 183 U. S. 642 (1901), was an action by the owners against the charterers of a yacht used for dispatch purposes during the Spanish-American War. The vessel was lost in the course of the employment and the Court held that under the various contracts existing between the parties the charterer had agreed to pay the value stated in one of the contracts, in case the vessel should be lost.

This was not a case where a charterer was suing because an owner did not tender a vessel under a charter, and the principle of frustration was not involved therein.

26. *Berg v. Erickson*, 234 Fed. 817 (1916), was a contract to furnish to one thousand cattle "plenty of good grass, salt and water," during the grazing season of 1913, at a certain rate per head. By a drought which amounted to "an act of God," full performance became impossible from July to October, but the performance contracted for was good during May and June and sufficient grass was given during the remainder of the season to keep the cattle alive and maintain their weight.

The Court held that damages were due for the failure to perform fully from July to October.

In the course of his opinion Mr. Justice Sanborn mentions that there were authorities to the effect that where performance of a contract becomes impossible through the destruction of the subject matter, without fault of either party, the contract is frustrated. But he indicates that inasmuch as no decision of the Supreme Court nor of any Federal court to that effect had been cited or discovered, he felt bound to adopt a contrary rule.

It is submitted that the case of *The Allanwilde* and other cases in the Circuit Courts of Appeal and District Courts, cited by the appellees, sufficiently show that this is not the case at present.

Berg v. Erickson is distinguishable, however, on the ground that the contract was performed in full for a part of the time and partially for the balance of the time.

27. *Hadley v. Clarke*, 8 Term. Rep. 259 (1799) shows the common law strictness. In that case the vessel was chartered to carry from Liverpool to Leghorn. While she was awaiting convoy at Falmouth, the Privy Council laid an embargo on all vessels proceeding to Leghorn July 27, 1796. The embargo was not raised until October 24, 1798. In August, 1798, the vessel returned to Liverpool and discharged her cargo, which the shipper received without prejudice and upon the lifting of the embargo sued the shipowner for breach of contract to carry.

The Court reluctantly allowed a recovery, on the ground that "a temporary interruption of a voyage by an embargo does not put an end to such a contract as this."

It is submitted that this case and *Spence v. Chodwick*, 10 Q. B. 517, also cited by the petitioner, *do not represent the present state of the English law as to frustration of charter parties.*

The Court is referred in this connection to the cases of *Lloyd Royal Belge v. Stathatos*, 33 T. L. R. 390, 34 T. L. R. 70, cited in the respondents' brief, and also to Scrutton on *Charter Parties and Bills of Lading*, eleventh Edition, pages 95 to 103, and the brochure of Mr. F. D. Mackinnon on "*The Effect of War on Contracts.*"

2. Error in permitting the British Ambassador to intervene, as *amicus curiae*, and to present a certificate avowing the requisition of the ship here in question as an act of his government, *held* not prejudicial. P. 629.
 3. A British ship, owned by a British corporation, was subject to requisition by the British Government for war purposes while in British waters preparing for service under a voyage charterparty made in this country with an American corporation. Pp. 628, 631.
 4. A telegraphic requisition treated as binding in the practice of the British Government, and followed by use of the ship as a government transport and compensation of the owner therefor, *held* valid. P. 628.
 5. Where a ship is rendered unavailable for the performance of a charterparty by a valid requisition of government, not invited by the owner or provided for in the contract, for a service likely to extend (which in this case did extend) beyond the time for the projected charter voyage, the owner is excused from performance. P. 629.
 6. The contract must be deemed to have been entered into subject to an implied condition that, in such an event, it should be at an end and the parties absolved from further liability under it. P. 631.
- 267 Fed. Rep. 1023, affirmed.

CERTIORARI to review a decree of the Circuit Court of Appeals affirming a decree of the District Court in admiralty. The facts are stated in the opinion, *post*, 625.

Mr. John W. Griffin for petitioner:

In the absence of a restraints-of-princes clause, the shipowner's obligation under the charterparty was absolute, and prevention by foreign law was not a defense.

Where a shipowner enters into an absolute covenant to carry a cargo, without protecting himself by exceptions, he is bound to perform it or to pay damages. An examination of the charter in suit shows that it contains no exception whatever applicable to the situation. *Spence v. Chodwick*, 10 Q. B. 517; *Jacobs v. Credit Lyonnais*, 12 Q. B. D. 589; *Howland v. Greenway*, 22 How. 491; *The Harriman*, 9 Wall. 161; *Blight v. Page*, 3 Bos. & P. 295; *Barker v. Hodgson*, 3 Maule & S. 267; *Northern Pacific*

Ry. Co. v. American Trading Co., 195 U. S. 439; *Ashmore v. Cox*, L. R. [1899] 1 Q. B. D. 436; *Blackburn Bobbin Co. v. Allen*, [1918] 1 K. B. 540; *Sun Printing Association v. Moore*, 183 U. S. 642; *Carnegie Steel Co. v. United States*, 240 U. S. 156; *Chicago, Milwaukee & St. Paul Ry. Co. v. Hoyt*, 149 U. S. 1, 14; *Columbus Ry. Co. v. Columbus*, 249 U. S. 399, 412; *Dermott v. Jones*, 2 Wall. 1; *United States v. Gleason*, 175 U. S. 588, 602; *Jones v. United States*, 96 U. S. 24; *Berg v. Erickson*, 234 Fed. Rep. 817; *Rederiaktiebolaget Amie v. Universal Transportation Co.*, 250 Fed. Rep. 400; *Richards v. Wreschner*, 174 App. Div. 484; *Aktieselskabet Frank v. Namqua Copper Co.*, 36 T. L. R. 438. *Furness, Withy & Co. v. Rederi Banco* [1917] 2 K. B. 873, distinguished.

The law has long been settled to the effect that, where there is an absolute obligation, difficulty or even impossibility of performance is no defense, except in cases of personal disability preventing performance of a contract for personal service, destruction of the subject-matter upon the continued existence of which the contract depends, and prohibition by domestic law.

The ship did not *cease to exist*, any more than if she had been delayed by stranding or by collision, or by any other obstacle. She was merely subjected to a restraint (assuming that the requisition was valid) of a kind not excepted in the charter and not permanent in its nature. Such a situation cannot be treated as an instance of destruction of the subject-matter of the contract. It is simply a case where performance has been rendered impossible for the moment by foreign law.

The case presents merely another instance of prevention by foreign law of the performance of an American contract—the same situation which has been so often and so uniformly dealt with by the courts both of this country and of England. 8 Elliott on Contracts, par. 1891; 2 Parsons, Contracts, 9th ed., p. 828; Leake, Contracts,

6th ed., p. 510; Wald's Pollock on Contracts, 3d ed., p. 530; Williston, Sales, § 661; Scrutton on Charter-Parties, 9th ed., p. 11; *Richards v. Wreschner*, 174 App. Div. 484; *Kirk v. Gibbs*, 1 H. & N. 810; *Barker v. Hodgson*, 3 M. & S. 267; *Gates v. Goodloe*, 101 U. S. 612; *Benson v. Atwood*, 13 Maryland, 20; *Clifford v. Watts*, L. R. 5 C. P. 577, 586; *Hore v. Whitmore*, 2 Cowp. 784; *Atkinson v. Ritchie*, 10 East, 530; *Blight v. Page*, 3 B. & P. 295; *Sjoerds v. Luscombe*, 16 East, 201; *Jacobs v. Credit Lyonnais*, 12 Q. B. D. 589; *Blackburn Bobbin Co. v. Allen*, [1918] 1 K. B. 540; *Trinidad Shipping Co. v. Alston & Co.*, [1920] A. C. 888; *Duff v. Lawrence*, 3 Johns. Cas. 162; *Holyoke v. Depew*, 2 Ben. 334; *Beebe v. Johnson*, 19 Wend. 500; *Ye Seng Co. v. Corbitt*, 9 Fed. Rep. 423; *Tweedie Trading Co. v. McDonald Co.*, 114 Fed. Rep. 985; *Spence v. Chodwick*, 10 Q. B. 517; *Swayne & Hoyt v. Everett*, 255 Fed. Rep. 71; *Taylor v. Taintor*, 16 Wall. 366.

The foregoing authorities indicate what has always been considered clear law—that, in the absence of an exception in the contract, the interference of a foreign government preventing the performance of the contract is not a legal excuse. This is well settled both in England and in this country.

The District Court sought to bring the present case within the authorities by calling it a case where the vessel had become non-existent. This is a mere figure of speech. It might equally well be said that, whenever the act of a foreign government prevents the loading of a cargo, that cargo is non-existent, and yet in case after case it has been held that liability exists under such circumstances. Indeed, any case of impossibility might be stated in the same sort of figurative language. Where there is truly destruction of the subject-matter, a peculiar situation is created, with which the law usually deals by declaring, as the fairest solution, that the contract is annulled. But where, the subject-matter being intact, an obstacle arises to performance by one party, the question is: Is the nature

619.

Argument for Petitioner.

of the obstacle such that, under the law or according to the provisions of the contract, the default is excused?

There was no frustration of the charter. If the doctrine of frustration is applied to cases where performance is prevented by foreign law, then either the general rule must be overturned (which is inconceivable) or else such cases must be treated as exceptional, and a new rule of law must be established to cover them.

The doctrine of frustration appears to be an effort to correct what, in some cases, has been regarded as the injustice of enforcing a contract under circumstances fundamentally different from those which the parties foresaw or could reasonably have been expected to foresee. The court in effect makes for the parties a new contract; or, perhaps more accurately, declines to enforce, for equitable reasons, the contract which the parties themselves have made.

Only in a case of the plainest need should such a remedy be applied, and it should never be applied to a case where the parties must have had the contingency in contemplation and simply failed to provide for it. Under those circumstances, it is submitted, no court can annul this or any other contract.

The so-called doctrine of frustration is really new in name rather than in nature. Nearly all the cases are simply instances of the well recognized types of impossibility. No court has held a contract frustrated unless the obstacle clearly appeared to be such as necessarily to postpone the performance of the contract beyond the time when it would be fair or reasonable to require the parties to perform it. Citing and applying or distinguishing the following: *Allanwilde Transport Corporation v. Vacuum Oil Co.*, 248 U. S. 377; *The Kronprinzessin Cecilie*, 244 U. S. 12; *Columbus Railway Co. v. Columbus*, 249 U. S. 399; *The Claveresk*, 264 Fed. Rep. 276; *The Isle of Mull*, 257 Fed. Rep. 798; *Lewis v. Mowinckel*, 215 Fed. Rep. 710; *Admiral*

Shipping Co. v. Weidner & Co., [1916] 1 K. B. 429; *Jackson v. Union Marine Ins. Co.*, L. R. 8 C. P. 572; L. R. 10 C. P. 125; *Bank Line v. Capel & Co.*, [1919] A. C. 435; *Tamplin S. S. Co. v. Anglo-Mexican Co.*, [1916] 2 A. C. 397; *Geipel v. Smith*, L. R. 7 Q. B. 404; *Scottish Navigation Co. v. Stouter & Co.*, [1917] 1 K. B. 222; *Countess of Warwick S. S. Co. v. Nickel Societe Anonyme*, [1918] 1 K. B. 372; *Modern Transp. Co. v. Duneris S. S. Co.*, [1917] 1 K. B. 370; *Chinese Mining Co. v. Sale*, [1917] 2 K. B. 599; *Millar & Co. v. Taylor & Co.*, 32 T. L. R. 161; L. R. [1916] 1 K. B. 402; *Austin Baldwin & Co. v. Turner & Co.*, 36 T. L. R. 769; *Lloyd Royal Belge v. Stathatos*, 33 T. L. R. 390; 34 T. L. R. 70; *Blackburn Bobbin Co. v. Allen Co.*, [1918] 1 K. B. 540; 2 K. B. 467; *Hudson v. Hill*, 2 Asp. M. C. 278; *Jones v. Holm*, 2 Ex. 335; *The Progreso*, 50 Fed. Rep. 835; *The Star of Hope*, 1 Hask. 36; *Hadley v. Clarke*, 8 Term. Rep. 259; *The Patria*, L. R., 3 A. & E. 436; *Hurst v. Usborn*, 25 L. J. C. P. 208; *Assicurazioni Generali & Co. v. Bessie Morris S. S. Co.*, [1892] 2 Q. B. 652; *Clark v. Massachusetts Fire Insurance Co.*, 2 Pick. 104; *In re Shipton, Anderson & Co.*, [1915] 3 K. B. 676; *Nickoll & Knight v. Ashton, Edridge & Co.*, [1901] 2 K. B. 126; *Taylor v. Caldwell*, 3 B. & S. 826; *Metropolitan Water Board v. Dick, Kerr & Co.*, [1918] A. C. 128.

In order to succeed under the facts of this case, the owners must establish that the mere fact of requisition, *ipso facto* and without more, as matter of law, terminated the charter. Without an exception, without proof of the probable length of the requisition, without any facts in the record from which the court can reach a conclusion about its probable length, there is nothing here but the mere fact that the vessel was requisitioned. No case has ever held that this alone is enough to accomplish frustration; numerous cases have held the contrary.

The alleged requisition was not a legally valid requisition. The diplomatic officers of a foreign government cannot, by

ex parte statements, preclude the courts of the United States from ascertaining the true facts with regard to it; nor should the courts of the United States receive or act on such statements, at least unless made through and with the sanction of the Department of State.

Whether or not the requisition was valid, the employment of the *Baron Ogilvy* from April to October, 1915, was not under any requisition but under a voluntary charter, and the certificate of the British Embassy should not be construed as contradicting this undisputed fact.

The respondents, after the happening of the alleged requisition, did not make efforts to secure the release of the vessel or to substitute other tonnage.

Mr. John M. Woolsey for respondents.

Mr. Frederic R. Coudert and *Mr. Howard Thayer Kingsbury*, by leave of court, filed a brief on behalf of the British Embassy as *amicus curiæ*.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is a suit in admiralty to recover damages for an alleged breach of a voyage charterparty entered into in New York, February 6, 1915, between a British corporation, which owned the *Baron Ogilvy* and other freight ships, and a Texas corporation, which was engaged in shipping and marketing petroleum products. The charterparty did not name a particular ship as the subject of the hiring, but required that one of a certain type be designated from among the ships of the British company, on or before March 15. In due time that company named the *Baron Ogilvy* and the Texas company assented. The intended voyage was from a port in Texas to another in South Africa with a full cargo of refined petroleum in cases. The ship was to be tendered at the initial port ready to load between April 15 and May 15, 1915, and in case of

THE TEXAS COMPANY v. HOGARTH SHIPPING
COMPANY, LTD., OWNER OF THE STEAMSHIP
BARON OGILVY, ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT.

No. 555. Argued January 26, 27, 1921.—Decided June 6, 1921.

1. A voyage charterparty for a vessel to be named, with no provision for a substitution, under which a vessel has been selected, is to be treated thenceforth as a contract for that particular vessel. P. 627.

default the Texas company was given the option of canceling or maintaining the charterparty. If the vessel was then at that port, the option was to be exercised at once and if she was not then there, it was to be exercised within twenty-four hours after her arrival. There was no clause expressly excepting restraints of princes, etc. April 10, 1915, the *Baron Ogilvy*, while in British waters and being provisioned for the intended voyage, was requisitioned by the British Government and pressed into its war service, in which she continuously was retained until October 20, following. On April 12 the British company notified the Texas company that the vessel had been requisitioned and therefore would not be available to carry out the charterparty. The Texas company thereupon procured another vessel to make the voyage at the time intended, but at an increased freight rate, and subsequently brought this suit against the British company on the theory that the latter had broken the charterparty and was liable in damages for the difference between the rate which it was to receive and that actually paid to the other vessel. On the final hearing the District Court rendered a decree for the respondent, the principal grounds of the decision being (a) that when in accordance with the terms of the charterparty the *Baron Ogilvy* was named as the ship to make the voyage the contract became an ordinary voyage charterparty for that ship, and none other, and (b) that that ship, before the time for the voyage, was taken in *invitum* by the owner's government for war use for a period likely to extend beyond the time for the intended voyage and that this dissolved the charterparty and excused the owner from furnishing the ship. 265 Fed. Rep. 375. The decree was affirmed by the Circuit Court of Appeals, 267 Fed. Rep. 1023; and a writ of certiorari brings the case here. 254 U. S. 625.

We agree that after the designation of the *Baron Ogilvy*,

conformably to a provision in the charterparty, every element of an ordinary voyage charterparty for a particular ship was present. It was then as if that vessel had been named at the outset. And, as there was no provision for substituting another ship, there was no obligation on the part of the owner to furnish, nor on the part of the charterer to accept, another. *Nickoll & Knight v. Ashton, Edridge & Co.*, [1901] 2 K. B. 126, 131. The contract related to a particular ship just as it related to a particular voyage. Neither could be changed without departing from the contract, which could not be done without the consent of both parties.

The libellant challenges the good faith of the owner and seeks by taking mere fragments of the evidence here and there to show that the owner invited the requisition, welcomed it as promising a better return than the charterparty, and in effect voluntarily turned the vessel over to the government. But the fragments to which attention is invited must be read with the context and all the evidence must be considered. When this is done it becomes very plain that there is no basis for the challenge. The owner made the usual preparations for complying with the charterparty, earnestly sought to prevent the requisitioning of the vessel, urged the existence of the charterparty as a reason for leaving her free, and respected the requisition, when made, because no other course was reasonably open. It may not be material, but in fact the charterparty gave promise of a better return and called for a service which would be less hazardous. The vessel was taken by the government for the use to which she was subjected and after the taking the owner agreed to furnish certain additional facilities by reason of which a higher compensation was obtained than otherwise would have been allowed. Beyond this the owner was accorded no voice in the matter.

As the ship was British and in British waters and the

owner was a British corporation the power of the British Government to requisition the ship is beyond question. But the libelant insists that those who assumed to exert this power did not proceed in the mode prescribed and therefore that the requisition was invalid. The facts adequately proved are as follows: A Royal Proclamation of August 3, 1914, authorized and empowered the Lords Commissioners of the Admiralty "by warrant under the hand of their Secretary" "to requisition and take up" British vessels within British waters for use as transports and auxiliaries. The *Baron Ogilvy* was requisitioned by an order of the Lords Commissioners and the order was communicated to the owner by a telegram signed "Transports" and saying: "SS. *Baron Ogilvy* is requisitioned under Royal Proclamation for government service." The telegram was sent by the Assistant Director of Military Sea Transports, the officer through whom requisitioning orders were executed. This was the usual mode of communicating such orders. Formal warrants never were issued. Generally, the telegraphic communication was followed, after a time, by a letter of like import bearing a block (printed) signature of the Secretary; but in this instance, through an error in office routine, no letter was sent. These letters were intended to be corroborative, but were not deemed essential; and in actual practice the Lords Commissioners and those who executed their orders proceeded on the theory that the ship was taken when the order was received by the owner, however the order was communicated, and that a telegraphic communication of it was effective and must be obeyed. Indeed, the evidence is that if the telegraphic order was not obeyed the vessel would be taken by force. The owner here—six of whose ships had been requisitioned theretofore—so understood the practice and respected the order. It does not appear that the government at any time or in any way disapproved of the practice, but does appear that in

this instance the government treated the telegraphic order as effective by using the ship as a transport for more than six months and compensating the owner accordingly. In these circumstances, the contention that the requisition was invalid is quite untenable. Whether in different circumstances it could and should be pronounced invalid here we need not consider. See *Underhill v. Hernandez*, 168 U. S. 250; *American Banana Co. v. United Fruit Co.*, 213 U. S. 347; *Oetjen v. Central Leather Co.*, 246 U. S. 297, 303, 304; *Ricaud v. American Metal Co.*, 246 U. S. 304, 309; *Northern Pacific Ry. Co. v. American Trading Co.*, 195 U. S. 439, 467-468.

In the District Court the British Ambassador was permitted to intervene as *amicus curiæ*, object to the adjudication of the libelant's claim and present a certificate avowing that the requisition was a governmental act. Complaint is made of this. The permission was improvidently granted, as was afterwards indicated by this court in other cases. *Ex parte Muir*, 254 U. S. 522; *The Pesaro*, 255 U. S. 216. But the libelant was not prejudiced, for the intervention and certificate ultimately were not considered and the decree was rested on the evidence otherwise presented.

Finally, the libelant insists that the requisition, even if valid and not invited by the owner, did not operate to dissolve the charterparty or to excuse the owner from performing it. The courts below held otherwise, and we think rightly so.

It long has been settled in the English courts and in those of this country, federal and state, that where parties enter into a contract on the assumption that some particular thing essential to its performance will continue to exist and be available for the purpose and neither agrees to be responsible for its continued existence and availability, the contract must be regarded as subject to an implied condition that, if before the time for performance

and without the default of either party the particular thing ceases to exist or be available for the purpose, the contract shall be dissolved and the parties excused from performing it. *Taylor v. Caldwell*, 3 Best & Smith, 826, 839; *In re Shipton, Anderson & Co.* [1915] 3 K. B. 676; *Horlock v. Beal* [1916] 1 A. C. 486, 494, 496, 512; *Bank Line, Ltd., v. Arthur Capel and Co.* [1919] A. C. 435, 445; *The Tornado*, 108 U. S. 342, 349-351; *Chicago, Milwaukee, & St. Paul Ry. Co. v. Hoyt*, 149 U. S. 1, 14-15; *Wells v. Calnan*, 107 Massachusetts, 514; *Butterfield v. Byron*, 153 Massachusetts, 517; *Dexter v. Norton*, 47 N. Y. 62; *Clarks-ville Land Co. v. Harriman*, 68 N. H. 374; *Emerich Co. v. Siegel, Cooper & Co.*, 237 Illinois, 610. The principle underlying the rule is widely recognized and applied to various classes of contracts. *The Kronprinzessin Cecilie*, 244 U. S. 12, 22-24. But, of course, it does not apply where the risk is fully covered by a term of the contract, nor where performance is not practically cut off but only rendered more difficult or costly. *Columbus Railway, Power & Light Co. v. Columbus*, 249 U. S. 399, 410, *et seq.* Perhaps the oldest and most familiar application of the principle is to contracts for personal service, where performance is prevented by death or illness. *Robinson v. Davison*, (1871) L. R. 6 Exch. 269; *Spalding v. Rosa*, 71 N. Y. 40. Another application widely recognized is where a ship chartered for a voyage, after the date of the charter-party and before the time for the voyage, is accidentally destroyed by fire, lost at sea, or injured in such degree as not to be available for the service. *The Tornado, supra*, was a suit on a contract of affreightment where the ship, before beginning the voyage, was accidentally burned and thereby prevented from undertaking it. This court held that the contract was dissolved, saying, p. 349:

"We are of opinion that by the disaster which occurred before the ship had broken ground or commenced to earn freight, the circumstances with reference to which the

contract of affreightment was entered into were so altered by the supervening of occurrences which it cannot be intended were within the contemplation of the parties in entering into the contract, that the shipper and the underwriters were absolved from all liability under the contract of affreightment. The contract had reference to a particular ship, to be in existence as a seaworthy vessel and capable of carrying cargo and earning freight and of entering on the voyage. All the fundamental conditions forming part of the contract of the ship-owner were wanting at the time when the earning of freight could commence."

Here the ship, although still in existence and entirely seaworthy, was rendered unavailable for the performance of the charterparty by the requisition. By that supervening act she was impressed into the war service of the British Government for a period likely to extend—and which as it turned out did extend—long beyond the time for the charter voyage. In other words, compliance with the charterparty was made impossible by an act of state, the charterer was prevented from having the service of the ship and the owner from earning the stipulated freight. The event apparently was not anticipated and there was no provision casting the risk on either party. Both assumed that the ship would remain available and that was the basis of their mutual engagements. These, we think, must be regarded as entered into on an implied condition that, if before the time for the voyage the ship was rendered unavailable by such a supervening act as the requisition, the contract should be at an end and the parties absolved from liability under it.

That the charterparty was entered into in this country is not material. The important consideration is that it became impossible of performance through a supervening act of state which operated directly on the ship and the parties could not avoid.

Decree affirmed.